UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM DAMON AVERY,

Plaintiff,

vs.

CITY OF MILWAUKEE, et.al.,

Defendants.

Case No. 11-CV-408

Milwaukee, Wisconsin

June 10, 2015

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TRANSCRIPT OF TRIAL
BEFORE THE **HONORABLE RUDOLPH T. RANDA,**
UNITED STATES DISTRICT JUDGE, AND A JURY

A P P E A R A N C E S

For the Plaintiff:	People's Law Office By: **Mr. John L. Stainthorp** **Ms. Janine L. Hoft** **Mr. Ben Elson** Attorneys at Law 1180 N. Milwaukee Avenue Chicago, IL 60622
For the Defendant:	Milwaukee City Attorney By: **Mr. Jan A. Smokowicz** **Ms. Jenny Yuan** Assistant City Attorneys 200 E. Wells St. - Rm. 800 Milwaukee, WI 53202-3551
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case Number 11-CV-408, William Damon Avery versus the City of Milwaukee, et.al. Called for continuation of the jury trial. May I have the appearances, please. First for the Plaintiff.

MS. HOFT: Good morning, Your Honor. Janine Hoft for the Plaintiff.

THE COURT: Good morning.

MR. STAINTHORP: Judge, John Stainthorp for the Plaintiff.

THE COURT: Good morning.

MR. ELSON: Good morning, Judge. Ben Elson for the Plaintiff.

THE COURT: Good morning.

THE CLERK: And for the Defendants?

MR. SMOKOWICZ: Assistant City Attorney Jan Smokowicz for the Defendants. Good morning, Your Honor.

THE COURT: Good morning.

MS. YUAN: Good morning, Your Honor. Assistant City Attorney Jenny Yuan for the Defendants.

THE COURT: Good morning. Well, the Court took some time here, went through the instructions. I didn't pay much attention to the verdict forms, so the Court has given you a form that it's going to submit, because I think it's an appropriate combination of the way the verdict form was framed

by both parties. And it also incorporates the claims that the Plaintiff makes and has made and that were absent from the Defendant's verdict form, which simply had a fabrication relative to the due process claim -- fabrication of testimony relative to the due process claim. I still think it's -- Question Number 1 is phrased appropriately, because the instruction relative to that first claim, a violation of due process incorporates the definition of that as being the fabricated testimony that was the cause of the criminal conviction of William Avery.

So I'm going to go through this, and then you can offer some suggestions. But the Court is going to present in this fashion, and I will explain why. Did -- Question 1: Did any of the following Officers fabricate testimony that was the cause of the criminal conviction of William Avery? And then lists all the Officers. Gulbrandson being absent from the formal verdict form because he's no longer a party.

Goes on, if you answered no to all parts of Question 1, then you need not answer any of the remaining questions. However, if you have answered yes to any part of Question 1, then answer Question Number 2. Goes into the claim that involves the intervention. Failure to intervene. Did any of those Defendants fail to intervene to prevent the use of fabricated testimony? And I suppose you could say did any of those Defendants be answered yes to, but that would not mean --

that is incorrect. The reason the Court -- it should read did any of the Defendants fail to intervene. Because -- not those Defendants, but did any of the Defendants fail to intervene to prevent the use of fabricated testimony. Because as it relates to Question Number 1, you could have answered yes to several of the Defendants in Question 1, and no to some of the others. But those who answered no, who may not have fabricated the testimony, could have failed to intervene.

So the second question is did any of the Defendants fail to intervene to prevent the use of fabricated testimony. If you have answered yes to any of the Defendants in Questions 1 or 2, then answer Question Number 3. Did any of those Defendants conspire to use fabricated testimony that was a cause of the conviction of William Avery? And, of course, that incorporates those people in 1 and 2 that yes answers were given.

The conspiracy charge, of course, by definition and the instruction states it is those who have the intent to commit an unlawful act. If you've answered no to the previous Defendants, then they hadn't engaged in the act, so they couldn't possibly have conspired to do that. So that's why that question is framed that way.

Did any of the Defendants conspire to use fabricated -- did any of those Defendants conspire to use fabricated testimony that was the cause of the conviction of William Avery.

And then we list all of the Defendants, however, so that we leave it up to the jury to determine what -- who those Defendants were that they answered yes to.

I thought about putting the question this way: Did any of those Defendants who you answered yes to in the previous two questions use fabricated testimony -- conspired to use fabricated testimony. But since we have been doing all of this, all the Defendants, leave it up to the jury. I think it's pretty clear that they can't answer yes to any of the Defendants that had conspired if they didn't answer yes to any of those Defendants in the previous two questions.

Now, if you've answered yes to any part of Questions 1, 2, or 3, then answer Question 4: Did the City of Milwaukee have a policy, practice, or custom of fabricating evidence to secure criminal convictions? Yes or no. If you've answered yes, then answer Question 5. Was the City of Milwaukee's policy, practice, or custom a cause of William Avery's criminal conviction? Yes or no. If you've answered yes to any of the previous questions, then answer Question Number 6. We award Plaintiff's compensatory damages in the amount of -- and then there's a blank spot. And then it goes on, if you've answered no to all parts of Questions 1, 2, or 3, then you need not answer Question Number 7. However, if you answered yes to any part of Questions 1, 2, or 3, then answer Question Number 7 as to any Defendant to which you answered yes. And that is what

amount of money, if any, do you award the Plaintiff as punitive damages against the following Defendants: And then all the Defendants are listed. And again, the jury's to answer as to those Defendants if they've answered yes to any part of Questions 1, 2, or 3. So that I think is the correct verdict form. And any comments?

MR. ELSON: Yes, Judge. A couple things on Question Number 1. It lists the Defendants -- it calls the Defendants the Officers, whereas in Question Number 2 it refers to them as the Defendants. For consistency sake should we change Officers in Question Number 1 to the Defendants?

THE COURT: Probably should change Officers to Defendants.

MR. ELSON: Yes. That's what I mean.

THE COURT: Okay. Yeah. You're right. Did the following Defendants fabricate testimony. It's consistent with 2.

MR. ELSON: And then in Question Number 1, 2, and 3, I believe testimony should be changed to evidence. Did any of the following Defendants fabricate evidence that was a cause of the criminal conviction of William Avery, as opposed to fabricate testimony.

THE COURT: Exactly.

MR. ELSON: And the same with Question Number 2. Did any of the Defendants fail to intervene to prevent the use of

fabricated evidence. As opposed to testimony. And Number 3 as well, changing the word testimony to evidence.

THE COURT: Okay. And that's consistent with Question Number 4, which uses evidence. It then is consistent throughout, and that's more accurate.

MR. ELSON: And then the last thing, Judge, Question Number 4 regarding the Monell claim. Our jury instruction characterizes the Monell claim as policy of the City of Milwaukee to not adequately investigate homicides. So we would suggest that the language in Question Number 4 be changed to read did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time material evidence was fabricated.

THE COURT: Run that by me again?

MR. ELSON: Sure. Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time material evidence was fabricated? For Question Number 4.

THE COURT: Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides -- and how did you phrase that?

MR. ELSON: Of inadequately investigating homicides at the time material evidence was fabricated.

THE COURT: Well, but that answers the liability question in that question. It's almost stating that there was

material -- that investigating homicides -- let's do it this way. Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time in question which led to the --

MR. ELSON: At the time in question? I think at the time in question would be fine.

THE COURT: Okay. Which led -- let's say time in question which led to the fabricating of evidence that resulted in criminal convictions. Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time of -- at the time in question which led to the fabricating of evidence that led to the -- that led to criminal convictions.

Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time in question which led to the fabricating of evidence that led to criminal convictions?

MS. HOFT: Going to use led twice?

THE COURT: Sorry.

MS. HOFT: I was suggesting using resulting in criminal convictions. Rather than using the word led twice.

THE COURT: Resulting in criminal convictions instead of that led to?

MR. STAINTHORP: Yes.

THE COURT: Did the City of Milwaukee have a policy,

practice, or custom of inadequately investigating homicides at the time in question which led to the fabricating of evidence, resulting in criminal convictions. I like your tie, by the way, Mr. Stainthorp. Okay. Anything else about this verdict form?

MR. ELSON: Nothing else, Judge.

MR. SMOKOWICZ: Your Honor, from the Defendants?

THE COURT: Yes.

MR. SMOKOWICZ: With respect to the change from evidence and testimony in Questions 1, 2, and 3, I think the Court actually properly stated it in all those 3 questions. Referring to testimony rather than evidence. Because there is no indication of the fabrication of anything other than testimony. That may be confusing to the jury to refer to it in a more generic fashion. The entire case has to deal with testimony of the three individuals. And, of course, I assume perhaps whatever argument the Plaintiff will make about his own statement. And those are all -- that's all that's there.

With respect to also Question 1 and Question 3 in terms of conviction, I'm concerned here about criminal conviction. Because the jury has heard twice about -- I mean, has heard much evidence about two convictions here. One for the drug charge, and one for the homicide charge. And the Court may wish to, in this question, focus it on the homicide conviction.

THE COURT: Change criminal to homicide? Which is the cause of the homicide conviction of William Avery?

MR. SMOKOWICZ: Technically it was actually party to a crime of homicide, but I think that's just confusing to the jury. And then although I sat silent here while the Plaintiffs made their request for a change to Question 4, so the Court could write out the question that they suggested, I object -- we object to the form of that question that's being changed now. First of all, the length makes it unduly confusing I think to the jury. And again, I think that policy, practice, or custom that has to be focussed on here is fabricating evidence. Otherwise, the jury's going to start to think -- may be confused as to some argument about something else, such as not having D.N.A. evidence available to it earlier, or something of that sort.

THE COURT: Well, I don't think that should be a concern with this language, because the inadequate investigation of homicides is connected to -- the inadequate investigation relates to the fabricating of evidence. I think that's pretty specific.

MR. SMOKOWICZ: All right. And just for the record, we're going to -- I'm going to make a -- we're going to make a motion to -- certain motions here at the end of the case still, and one of the motions we would make would be to dismiss both the conspiracy and the punitive damages claim, as well as the Monell claim. So for the record I guess I have to object to the questions on those items.

THE COURT: Right.

MR. SMOKOWICZ: And since we'll also be making a motion to dismiss Mr. DeValkenaere separately, I will make a motion as to that, too.

THE COURT: Okay. Well, let's take care of the instructions first. The better practice now that we have the jury answering these questions -- close to having the jury answer these questions, is to have the jury answer the questions. The Seventh Circuit has, in fact, suggested that it's probably the better form, particularly when we're talking about analysis of evidence, and the factual basis for the claims, and whether or not they're proven. So what I'm saying is that I'll probably deny those motions.

MR. SMOKOWICZ: I got that impression from the statement there, Your Honor, but I think particularly with respect to one other motion I need to make, I have to make it as a matter of record, or otherwise I've --

THE COURT: Of course the standard is the evidence looked at in the light most favorable to the party moved against. And that's a tough row to hoe, and as I said, the Seventh Circuit directs the Court to avoid the question if it's possible. And that is possible if the jury comes back with a verdict in favor of the Defendants. If it doesn't, then that motion can be renewed and you've preserved the record.

MR. SMOKOWICZ: My only concern, just so the Court's

aware of it, is with respect to the 50(a) motion that we made, the motion to dismiss as a matter of law. There's a case, Szmaj, S-Z-M-A-J, versus AT&T, and the citation is 291 F.3d 955, and in particular Page 957. And the Court of Appeals I think made fairly clear -- it's a slightly different version of Rule 50(a) and 50(b), but made very clear that a Defendant that makes a motion to dismiss as a matter of law at the close of the Plaintiff's case forfeits any subsequent motion after a verdict if they don't renew that motion at the close of all evidence. So that's why we would -- I mean, I have to make a record just on that -- that I'm making the motion.

THE COURT: Right. And the Court just acknowledged that.

MR. SMOKOWICZ: Okay.

THE COURT: It's on the record.

MR. SMOKOWICZ: Okay. Good enough.

THE COURT: So we will go with the verdict form which we've just discussed. Relative to the instructions --

THE SECRETARY: Are we changing testimony to evidence? Or are we leaving it testimony?

THE COURT: Well, that's right. We didn't -- we went into a different matter because the Court didn't take up the objection -- that the Court altered testimony to evidence. The argument is that the testimony that was gleaned -- the evidence that was gleaned during the course of this investigation

resulted in the testimony, of course. So I think evidence is the appropriate term here. The -- or at least some of the evidence gathered resulted in testimony at trial. So the statements made by whoever, Randolph, Kent, Kimbrough, et cetera, or Mr. Avery himself, were evidence. Statements which are not categorized as testimony at that point, but become testimony when they're admitted into the record at trial. So I think we're going to leave evidence instead of testimony. So that answers your question, Madam Secretary?

THE SECRETARY: And what about homicide conviction instead of criminal conviction?

THE COURT: And homicide conviction instead of criminal conviction, to answer the concern of the Defendants that there were two convictions in this case. Drug conviction and homicide.

MR. SMOKOWICZ: Just so the Court knows, Question 3 has no description of which conviction. So I guess we'd have to insert the word homicide there.

THE COURT: All right. The Court will add homicide there also. I think -- okay relative to --

MR. SMOKOWICZ: And, Your Honor -- I'm sorry. Miss Yuan pointed out to me we have the word criminal in Question Number 5, too. And 4.

THE COURT: You know, now that I look at that, that is true. Did the City of Milwaukee have a policy, practice, or

custom of inadequately investigating homicides at the time in question which led to the fabricating of evidence, resulting in -- how about the homicide conviction of Mr. Avery?

MR. ELSON: Yes.

THE COURT: Then it's more specific and tailored and it's consistent with the previous questions.

MR. ELSON: Would you leave out Question Number 5, then?

THE COURT: Yes. Because if you answer yes to the question in the way I've just framed it, that's causal. So 4 would be did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time in question which led to the fabricating of evidence resulting in the homicide conviction of William Avery? And then if you've answered yes to Question 4, then answer Question Number 6. Well, wait a second.

MR. SMOKOWICZ: Question 6 becomes Question 5. Right.

MR. ELSON: Question 6 will become Question 5.

THE SECRETARY: Don't you have to put if you answered yes to any of the previous questions?

THE COURT: Then answer question 5. So Question 5 is out, but Question 6 becomes Question 5 except with the preface to Question 5, and that is -- that remains. If you answered yes to any of the previous questions, then answer Question Number 5. We award the Plaintiff compensatory damages in the amount of.

And then Question Number 7 becomes Question Number 6.

MR. SMOKOWICZ: And the instruction right before it, if you answered no instruction. The reference to 7 becomes the reference to 6.

THE COURT: Right. Okay. The instructions were fairly consistent. The Court -- let's go over those. The Court would give the function of the Court and jury, which is -- these are some of the Court's standard instructions. The evidence, which I've already explained to the jury prior to trial. Testimony of the witnesses. Deciding what to believe. Weighing the evidence. What is not evidence. And direct and circumstantial evidence, definition. Interviewing witnesses. Court's standard instruction. Number of witnesses. Plaintiff's instruction relative to the Fifth Amendment assertion by Mr. Kent. Any objection to that?

MR. SMOKOWICZ: No, Your Honor.

THE COURT: And then the parties and the claims, which is proposed instruction by the Plaintiff. I think that's a nice explanation.

MR. SMOKOWICZ: Your Honor, except I think both sides agree there need to be some changes to it.

THE COURT: Relative to the causes of actions that have been eliminated?

MR. SMOKOWICZ: Well, that's one of them. The other one is Mr. Gulbrandson's name is in the first paragraph.

THE COURT: Right. That's out.

MR. SMOKOWICZ: And I think the suggestion we had between the two of us was in the second paragraph to read the Plaintiff claims that the Defendants violated his civil rights. Failed to intervene to prevent the violation of his civil rights and conspired to violate his civil rights. And then the rest of that sentence is struck.

THE COURT: Okay. And that tailors the causes of action.

MR. ELSON: Yes.

THE COURT: Follows it. Okay.

THE SECRETARY: So violated the civil rights. Failed to intervene to prevent the violation of his civil rights?

MR. SMOKOWICZ: Yes. And conspired to violate his civil rights.

MR. ELSON: And then delete from the word maliciously to --

THE COURT: Right. First claim instruction.

MR. SMOKOWICZ: Your Honor, before we get to that, Page 11 there's a requirement of personal involvement.

THE COURT: Yeah, the Court is going to give that instruction.

MR. SMOKOWICZ: Again --

THE COURT: Gulbrandson is out.

MR. ELSON: Judge, one point on that. The Seventh

Circuit pattern instruction says that if there's a failure to intervene claim included in the case, that they suggest that the failure to intervene claim come directly after this instruction. And that the claim be prefaced with the word however. Because there could be some confusion as it relates to the failure to intervene claim, because at the end of the personal involvement claim it says you may not hold any one of these individuals liable for what other employees did or did not do, but the failure to intervene claim modifies that.

THE COURT: Right. At the end of that personal involvement instruction would say however, and then you go right into the second claim, which is Plaintiff's second claim is that Defendants Hernandez, Phillips, Hein, Heier, Armbruster and DeValkenaere failed to intervene to stop the violation of Plaintiff's due process rights.

MR. ELSON: Yes.

MR. SMOKOWICZ: So the second claim, the instruction on the second claim will come right after the requirement of personal involvement? Is that the notion here?

THE COURT: Yes. Requirement of personal involvement. And then we do that before we got to -- well, we do claim one first. And then -- then we'd have the requirement of personal involvement.

Now, relative to the violation of due process claim, the Court has the first paragraph reading the Plaintiff's first

claim is that Defendants Hernandez, Phillips, et cetera, violated his Constitutional right to due process of law by fabricating evidence. Okay? That's what the allegation is. That's the core of the case. To succeed on this claim as to the particular -- now, the Defendants one, knowingly fabricated. Participated in the fabrication. And that's where the Defendants' proposed instruction -- and they have to prove number 3 from the Defendants' fabrication of evidence elements instruction. So the Defendant fabricated or participated in it using materially false evidence that -- quote, the Defendant and the witness knew the testimony given by the witness against the Plaintiff was false.

MR. ELSON: I think -- I mean, it seems that there might be a problem with the word testimony again, Judge. Because --

THE COURT: Evidence. Okay. Yeah. The evidence given by the witness against the Plaintiff was false.

THE SECRETARY: So inserting that before number 2?

THE COURT: Number 2. And then number 2 in the Plaintiff's due process instruction becomes number 3, and the Plaintiff was damaged as a result of the fabrication.

MS. HOFT: So, Your Honor, you're saying that Defendants' number 3 would then become Plaintiff's -- would go into Plaintiff's instruction as number 2?

THE COURT: Number 2, yeah.

MS. HOFT: And my only issue is with that sentence both Defendant and the witness. We would propose that it read both Defendant and the witness knew that evidence against the Plaintiff was false. Because the issue of testimony versus evidence. Statements versus testimony. The admission of statements versus the presenting of testimony.

MR. SMOKOWICZ: Your Honor, I thought that was just addressed by Mr. Elson, and I thought the suggestion was both Defendant and witness knew the evidence given by the witness was false.

THE COURT: She wants given by the witness. It's just evidence against the Defendant was false.

MR. ELSON: Yes. Because evidence given by the witness with is ambiguous.

THE COURT: Given by the witness. It ultimately becomes the witnesses at trial, which is the deprivation of liberty. But it's the evidence that we're focusing in on, and the evidence wherever it stood. However, has to be shown that Defendant and the witness knew the evidence against the Defendant was false.

MR. SMOKOWICZ: That's fine, Your Honor.

THE COURT: And the Plaintiff's instruction goes right into the definition of materiality. But there should be that concluding paragraph about if you proved each of these things by a preponderance, then you should find. If, on the other hand,

you find that it failed to prove, then you should find -- and that should be -- that should be included in the Plaintiff's instruction as the concluding paragraph.

MR. ELSON: I think there should also be a definition of fabricated, Judge, which we did not include in our proposed instruction. But I have a suggestion, if the Court would like to hear it.

THE COURT: Sure.

MR. ELSON: The dictionary definition of fabricated is evidence that was created or made up. Or -- yeah, created or made up. So we would say I will now define the term fabricated. Fabricated evidence is evidence that was created or made up. And then define the term material as we have it in our proposed instruction.

MR. SMOKOWICZ: Your Honor, we would object. I don't think there's any need for a definition of -- there's a dictionary definition. I think this jury is well educated. I -- certainly they're not confused about what the word fabricated or fabrication means.

MR. ELSON: Well, it's not a common word, Judge. In the Whitlock case, which is the fabrication case, they used the word create and the word manufacture interchangeably with fabricate.

THE COURT: Okay. The Court will give that over the objection of defense. And where we'll do that is in the

violation of due process claim. The Court indicated it was going to add the fabrication of evidence elements from the Defendants' Number 3 as an element in the due process. So that's number -- as I indicated, that's number 2. Number 3 is -- then number 2 in the Plaintiff's instruction becomes number 3. And then we have the definition of material. With regards to that, fabricated evidence is considered material if it would have a reasonable likelihood of affecting the outcome of the case. And then that would be -- right there would be a fabrication -- what was the definition?

MR. ELSON: Evidence that was created or made up.

THE COURT: So it would be fabricated evidence.

MR. ELSON: Is evidence that was created or made up.

THE COURT: Evidence that was created or made up. And then the final concluding paragraph, then if you find that the Plaintiff has proved each of these things.

MR. ELSON: And one other issue, Judge. We think there should be an instruction on the burden of proof, the preponderance of the evidence.

THE COURT: Yeah. That was absent. I was going to raise that question.

MR. ELSON: Yes. And I believe that the Defendants agree with that, and I think the place to insert it would be right before the first claim, since the preponderance of the evidence is referenced in the first claim.

THE COURT: Yes.

MR. ELSON: And I have a suggestion for that. Should I read it?

THE COURT: Is your suggestion the standard instruction?

MR. ELSON: It's a slight modification of the pattern instruction.

THE COURT: Do you agree with that, Mr. Smokowicz?

MR. SMOKOWICZ: I think we should just stay right with the pattern instruction. It's straightforward here.

MR. ELSON: The pattern instruction references if you find and if you decide. And I don't believe those phrases are used in the instructions, so I -- in the modified version that I created I left that out and just focussed on preponderance of the evidence, and what the definition of preponderance of the evidence is, as opposed to mentioning if you find or if you decide, which is in the pattern instruction.

MR. SMOKOWICZ: Your Honor, here's the perfect example of why the reference to if you find or if you decide has to be included here. The Court is adding in the paragraph from the Defendant's proposed instruction on fabrication of evidence. At the last paragraph there, on Page 17, and the very first words there, are if you find. And the words in the second sentence there is if, on the other hand, you find.

THE COURT: Let me cut this short. It's the policy of

the Court, having been reversed on more than one occasion by the Seventh Circuit, we'll take the Seventh Circuit's admonition that it's the safer practice to follow the pattern instructions. And having just had lunch with one the 7th Circuit Judges who was on the pattern committee, I was told to do that. Even at lunch. I'm going to follow the pattern instructions.

MR. ELSON: That's fine, Judge.

THE COURT: Bill Bauer, by the way. And then conspiracy. Was there any alteration of that?

MR. ELSON: Not from the Plaintiff, Judge. Other than removing Gulbrandson's name from the first sentence.

MR. SMOKOWICZ: And, obviously, consistent with our position, Your Honor, we would object to giving the instruction on conspiracy. Because we don't believe that there is evidence of it. But if the Court -- obviously we recognize the Court's ruling, and other than the exclusion of the name Gulbrandson, we do not object to the form as proposed by the Plaintiff.

THE COURT: Then the Court will give that. And then the claim against the City. Any objection to the way that's framed? Except the Court is going to add definition from the Defendants' -- in other words, the Court would give the sixth claim, or the policy claim as -- was labeled as the sixth claim originally. The paragraph which the last -- or the last two sentences from the liability instruction offered by the defense, the City is not responsible simply because it employed each

Officer -- I suppose we should change that to Defendant to be consistent. The City of Milwaukee is liable if the Plaintiff proves that the Defendants' actions -- Defendant or Defendants' actions in denying the Plaintiff the right to a fair trial was a result of its official policy.

MR. ELSON: I'm sorry, Judge. Where are you reading from? What page?

THE COURT: This is 29 of the original instructions submitted. And then that's the last two sentences of Page 29 added onto your -- added onto the policy claim.

MR. ELSON: I see. Okay.

THE COURT: And then the Defendants' definition of official policy. I've used that in other cases.

MR. SMOKOWICZ: So just to be clear, the Court is intending to give the two last sentences there on the liability of municipality instruction. Changing the word Officer and -- Officer or Officers to Defendants?

THE COURT: Yes.

MR. ELSON: And with regard to the definition of official policy, the first two bullet points of rule or regulation passed by the City of Milwaukee legislative body, that doesn't apply to this case, so --

MR. SMOKOWICZ: Well, Your Honor, I would object to excluding any of that there, because if there's no evidence of it the jury still needs to know that that's what an official

policy is.

THE COURT: Yeah, I think that context is important in considering the issue of official policy. Even though it's not in the record that -- there's not evidence in the record that it was a rule or regulation passed by the City legislative body.

MR. ELSON: Then can we insert an "or" after the first bullet point? And then also an "or" after the second bullet point? So that the jury can understand that it can be any of the three?

THE COURT: Sure.

MR. SMOKOWICZ: I think that's consistent with the law, Your Honor. We would not object.

THE COURT: Okay.

MR. ELSON: And then the third bullet point. A custom of fabricating witness evidence. That is inconsistent with how we've characterized the claim in the verdict form, and in our jury instruction. I think it should be a custom of not adequately investigating homicides at the time in question.

THE COURT: Any objection to that, Mr. Smokowicz?

MR. SMOKOWICZ: I do, Your Honor. The nature of the claim is evidence fabrication. I think it's misleading and inappropriate to argue that it was just somehow a habit of not adequately investigating. That makes it sound like we need to have a perfect investigation, which is not the law.

MR. ELSON: Well, it should track what we did with the

verdict form.

THE COURT: Well, it tracks with the verdict form, one. And two, it's not the fabrication of witness that's -- of this claim. It's the inadequate policy that leads to the fabrication. So the Court will do that. What was that language again? Custom of inadequate investigation? Was that --

MR. ELSON: Inadequately investigating homicides at the time in question. Which led to the fabrication of evidence resulting in the homicide conviction of William Avery. I guess leaving out the resulting in part. So --

MR. SMOKOWICZ: I'm not following where you're making this change in that third bullet point.

MR. ELSON: It would read a custom of fabricating -- I'm sorry. A custom of inadequately investigating homicides at the time in question, which led to the fabrication of evidence that is persistent and widespread.

THE COURT: How about this. The custom was inadequately investigating homicides at the time in question that was persistent and widespread which led to the homicide -- so that it -- the City's -- so that it was the City's standard operating procedure.

MR. ELSON: Yes.

THE COURT: That led to the criminal conviction of William Avery.

MR. STAINTHORP: I think the led to the criminal

conviction comes in the subsequent --

MS. HOFT: In the elements instruction.

THE COURT: The custom of inadequately investigating homicides at the time in question that was persistent and widespread so that it was the City's standard operating procedure, which led to the conviction -- homicide conviction of William Avery.

MS. HOFT: I don't think in this definition of what an official policy or -- or one of the three possible ways an official policy can be shown, that we have to include the causation requirement of the conviction of William Avery. I think --

MR. SMOKOWICZ: Your Honor, quite to the contrary. I would object if it didn't connect the two, because it has to be causally related.

MS. HOFT: It absolutely does have to be causally related, but in the way that it's written, as the Defendants propose it, there's no mention of causation.

MR. SMOKOWICZ: Well, let's go back here. We do have a causation -- assuming that the Court is giving the last sentence on the liability of municipality on Page 29, that does have the causation in it. That being the case, if we're just defining here the term official policy, I would now concur that we do not have to then re-include the requirement of causation. So that that third bullet point I -- it appears -- it sounds

like it's going to read a custom of inadequately investigating homicides at the time in question that was persistent and widespread so that the -- so that the -- so that it's the City of Milwaukee's standard operating procedure, period.

THE COURT: So that it was the City of Milwaukee's standard operating procedure. Okay.

MR. STAINTHORP: And, Judge, moving forward could I add a point?

THE COURT: Sure. Where is that?

MR. STAINTHORP: Okay. So Page 25 entitled cause. Obviously this was written with respect to the State law claims. So I -- we have talked with the Defendants, and I think we have a proposed amendment to this cause instruction. And while it says in answering Question 5 -- but it should be -- it should be as to all the --

MR. SMOKOWICZ: Liability questions?

MR. STAINTHORP: Liability questions. Okay. So I guess I don't have a proposal as to the first phrase. But after that, when it says you must decide whether someone's negligence? We proposed deleting negligence and substituting actions. Then keep the instruction as is on the second sentence.

Then for the third sentence where it says someone's negligence, say someone's act instead of negligence caused the injury if it was a substantial factor in producing the injury. Then for the next sentence, an injury may be caused by one

person's act, instead of negligence. Or by the combined acts, rather than negligence of two or more people.

But how about going back to the first phrase and just saying -- deleting entirely the first phrase and just saying you must decide whether someone's actions caused the injury, or whether a Defendant's. Because then that incorporates the City as well as the individual Defendants.

THE COURT: Any Defendants?

MR. STAINTHORP: Or whether a Defendant.

THE COURT: Any of the Defendants.

MR. STAINTHORP: Yeah. Okay.

THE COURT: Is that acceptable, Mr. Smokowicz?

MR. SMOKOWICZ: Yes. In that form.

MR. STAINTHORP: And then the second paragraph on Page 25 is deleted in its entirety.

THE COURT: Okay. Agreed?

MR. SMOKOWICZ: Yes, Your Honor.

THE COURT: Damages are the same, I believe.

MR. ELSON: There was one issue with the damages instruction on Page 31. At the end of the first paragraph it says on that claim. Those three words should be deleted.

MR. SMOKOWICZ: I'm sorry. I did not follow. What page is that on?

MR. ELSON: Page 31.

THE COURT: Right.

MR. ELSON: The words at the end of the first paragraph, on that claim, those words should be deleted. It should just say the Plaintiff is entitled to recover. I believe that's consistent with the instruction you proposed. That the Defendants proposed.

THE COURT: Okay. Any difference on the compensatory damages? Looks like it's the same.

MR. ELSON: Well, the Defendant left out mental and emotional pain and suffering, which we would obviously want included, and is included in our proposed instruction. And also any loss of normal life that the Plaintiff experienced to the present. That's not included in the Defendants' proposed instruction, but it is included in ours. And the Defendants include a nominal damages instruction, which I think is inappropriate in this case, and we didn't include that in our proposed instruction.

THE COURT: Okay. Anything else on this? I'll give the Plaintiff's instruction, then.

MR. SMOKOWICZ: The -- I would -- we would object to the any loss of normal life portion. I think that's duplicative of the physical, mental, and emotional pain and suffering. Nobody is talking about torture here. Nobody is talking about physical injury where there's bodily pain. So that's not going to be confusing. We're all talking about the emotional suffering that someone has from being incarcerated. And so this

makes -- making it a separate item makes it sound like it's somehow separate and additional.

MR. ELSON: It's in the pattern instruction.

THE COURT: Yeah. Loss of normal life is acceptable to the Court, so the Court will include that. And then punitive damages.

MR. ELSON: I believe those are exactly the same, Judge.

THE COURT: Yes. Looks that way. And then, of course, the selection of a foreperson. Communication with the Court. The Allen instruction. Use of electronic devices.

MR. SMOKOWICZ: I have no problem with any of those. For the record, we would object to giving the punitive damages instruction, as we don't think there's evidence to support punitive damages.

THE COURT: The Court disagrees.

MR. ELSON: One other -- something we just noticed on Page 44, the last paragraph. It says the 12 of you. That should be changed to the 9 of you.

THE COURT: Nine. Okay.

MS. YUAN: Or can we just say all of you?

MR. ELSON: Or all of you.

THE COURT: Okay. Anything else?

MR. ELSON: Nothing else.

THE COURT: All right. We'll get these instructions

to you.

MR. STAINTHORP: Judge, there's another issue that we want to raise, which is that we would like to again propose that there be a Brady instruction. I've -- we've, as you know, previously made that motion. You denied it. We believe that since that time there has been additional evidence of Brady violations by the Defendants in this case, and relating to their knowledge that the evidence that was being presented by the jailhouse informants was incorrect. Also related to the fact that there was knowledge that Mr. Kent in particular was looking for benefits with respect to his testimony. And that was not disclosed. And with respect to the payments to Ms. McCoy, which were also not disclosed. So we would again request that there be a Brady instruction to the jury. That they be allowed to determine whether the Plaintiff's rights under Brady were violated.

THE COURT: Okay. The Court is going to deny that. I don't think it rises to that level, considering the testimony of Detective Hein, in particular, and also Detective Armbruster involved in that initial conversation with Kent. But without going into all of the facts that would support it, I'm going to deny that motion. And it's made part of the record.

MR. SMOKOWICZ: Your Honor, I have a couple of things. Housekeeping with respect to Exhibits. With regard to Defendant's Exhibit 1052, that is the Avery deposition

transcript. It was used for cross examination purposes during his testimony. It was offered as an Exhibit. We do not ask the Court to provide the entire transcript to the jury; however, since it's been marked as an Exhibit, we are offering it for the purpose that it was used here, and to have it included within the record.

THE COURT: Well, whether the jury sees it or not, the Court, as I indicated I think earlier, has the policy that we'll give the jury what they ask for, unless there's an objection from either party at the time. And we'll iron that out at that time. But has 1052 been admitted?

MR. SMOKOWICZ: No. That's why I'm making the motion now to admit it.

THE COURT: Is there any objection to having it admitted as a piece of evidence?

MR. STAINTHORP: Judge, we object to it being admitted en masse. We think if there are specific portions that were questioned about during the interrogation, or were brought out during the interrogation, yes, they are part of the --

THE COURT: I think that was your request, wasn't it, Mr. Smokowicz? That just that part of it be admitted?

MR. SMOKOWICZ: Well, we offer the entire transcript as an Exhibit. The Court's indicated to me, at least, or the Court's Clerk indicated to me that the entire transcript should be marked as an Exhibit. I only did read a portion from it.

But -- and I'm not offering anything beyond that for the jury to consider. But I do think in order to include it within the record of this case, it has to be offered as an Exhibit. And just simply -- I'm asking the Court to accept it on that grounds as an Exhibit.

THE COURT: So it would be accepted as an Exhibit, but only as to that particular portion that was offered?

MR. SMOKOWICZ: Right.

MR. STAINTHORP: No objection then, Judge.

THE COURT: And the Appellate Court cannot look at that if it goes that way. Cannot look at the rest of the Exhibit, because it wasn't evidence in the case.

MR. SMOKOWICZ: Right. Then with -- I don't know whether it's been -- whether I need to beat a dead horse here, but just to make clear, we are making a motion to dismiss as a matter of law at the end of the entire evidence. We are making a motion to dismiss Detective DeValkenaere at the end of the evidence. We're making a motion to dismiss the punitive damages claim, and the conspiracy claim, and the Monell claim.

THE COURT: Okay. The Court's ruling is on the record.

MS. HOFT: Your Honor, in the vein of Exhibits, Plaintiff's Exhibit 4, it was brought to our attention, was never moved into evidence. It began in opening statement as a demonstrative evidence, but throughout this trial --

THE COURT: Any objection to that being received, Mr. Smokowicz?

MR. SMOKOWICZ: No, Your Honor.

THE COURT: The Court will receive it.

MS. HOFT: I'm going to put it back up on the table.

THE COURT: Anything else before we break?

MR. ELSON: Nothing from the Plaintiff, Judge.

MR. SMOKOWICZ: Nothing from the Defendants, Your Honor.

THE COURT: Okay. Get ready to go, and we'll get those instructions to you before we start the closings.

MR. SMOKOWICZ: 12:30, Your Honor?

THE COURT: That's when the jury's back. So yeah.

MR. SMOKOWICZ: Okay.

THE COURT: Do you need some more time? Tomorrow morning?

MR. SMOKOWICZ: I think we can do it.

THE COURT: And I had the time, because I didn't have to go back to the Doctor.

MR. STAINTHORP: Judge, do you want to set time limits? Or do you set any time limits?

THE COURT: I leave it up to counsel. I don't like to put restrictions on counsel, but we're all professionals. We know what's going to lose a case and what's not. You go on and on, you can lose a jury. The mind disengages when the seat

takes over, as they say.

MR. STAINTHORP: Okay. Thank you, sir.

THE COURT: Alright. See you at 12:30.

(Whereupon a recess was called by the Court. Upon conclusion of the recess, the proceedings continued as follows:)

THE COURT: We're ready for the jury?

MR. SMOKOWICZ: Two matters, Your Honor.

THE COURT: Sorry?

MR. SMOKOWICZ: Two matters, Your Honor. I apologize. One thing is just a reminder. We still have not mentioned to the jury that Mr. Gulbrandson has been dismissed. And I did believe the Court was going to make an indication to them of that. Second thing, I think both sides overlooked a requested instruction that should be given, unfortunately, on expert witnesses.

THE COURT: Expert witnesses?

MR. SMOKOWICZ: 1.21.

THE COURT: Okay. The Court will give that expert witness instruction. And the Court will advise the jury when they come in that per stipulation Detective Gulbrandson has been dismissed from the case as a Defendant.

MR. SMOKOWICZ: Thank you, Your Honor. I'm sorry about missing that instruction before.

THE COURT: Well, I thought about it, but you're the guys that drafted the instructions. I figured you might want to

include that under the general credibility of the witness instruction, so -- I suppose we should have the language that you're free to disregard the testimony even of an expert witness if you find that the factors suggest that it should be done. So -- no problem.

MR. SMOKOWICZ: Thank you, Your Honor.

THE COURT: Other than that, we're all set?

MR. SMOKOWICZ: There's a typo I see on Page 12 of the instructions, Your Honor.

THE COURT: Page 12?

MR. SMOKOWICZ: Yes.

THE COURT: I usually catch those up here.

MR. SMOKOWICZ: Just so that you see it's on the second line, second paragraph, prove both. And there are three factors now.

THE COURT: Okay.

MR. SMOKOWICZ: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon the jury was returned to the courtroom at 12:49 p.m.)

THE COURT: Good afternoon, ladies and gentlemen of the jury. As indicated, we're now ready for the closing arguments of the attorneys, after which I will instruct you in the law that should govern you in your deliberations, and then you will go into the jury room and deliberate on the case. The

Plaintiff has the burden, so the Plaintiff goes first. And Miss Hoft, if you're ready you may proceed.

MS. HOFT: Thank you, Your Honor. Members of the jury, first of all I want to thank you on behalf of my colleagues, Ben Elson and John Stainthorp. But also most importantly on behalf of our client, William Avery. We really appreciate the time and the patient attention you've given to this case in the last 7 days of testimony. And we appreciate that you're considering this important case.

Milwaukee Police Department Detectives, Defendants Hernandez, and Phillips, DeValkenaere, and Hein-Spano, and Heier, and Armbruster caused William Avery to be wrongfully convicted of the murder of Maryetta Griffin.

THE COURT: Maybe I'll interrupt. You've heard the list of Defendants that counsel has just mentioned. And not included in that is Detective Gulbrandson. It was mentioned at the start of the case. But by stipulation of the parties Detective Gulbrandson has been dismissed as a Defendant in this case. And that's why you did not hear Miss Hoft mention his name as a Defendant just now. I'm sorry to interrupt, Miss Hoft.

MS. HOFT: Thank you, Your Honor. The claims in this case involve due process and the administration of justice. Due process ensures the rights and equality of all citizens. The Constitutional claims brought in this case are fundamental to

all of us. That no one can take the liberty of another without due process of law. And that a violation of due process is a violation of the Constitution, for which you must find a remedy in this case, and assess damages, and provide William Avery a measure of justice.

We know that William Avery did not kill Maryetta Griffin. You heard William's testimony that he did not kill her, and he never told anyone that he did. There was absolutely no physical evidence suggesting that William Avery had anything to do with the death of Maryetta Griffin. There was nothing on her body. There was nothing at the scene where they claim her killing occurred. There was nothing in the car they claim transported her body to where it was found. There was nothing found with her body. There was evidence that among Maryetta Griffin's injuries was a gash to her head, suggesting that there would be blood evidence where she was killed.

In fact, William Avery, as we now know, was excluded by D.N.A. evidence back in 1998 that had been recovered from an oral swab taken from Maryetta Griffin's mouth showing the presence of semen. William was excluded also by D.N.A. evidence recovered from Maryetta Griffin in terms of her fingernails. And those fingernails show that there was -- there was the presence of 3 other individuals, not William Avery. Which means Maryetta Griffin may have fought for her life. But William Avery had nothing to do with her murder.

And you heard the evidence about Walter Ellis. That Walter Ellis was convicted of 7 other murders which occurred in a similar manner within a similar area of the north side of Milwaukee. Debra Harris. Tanya Miller. Irene Smith. Florence McCormick. Sheila Farrior. Joyce Mims. And Quithreaun Stokes. Those 7 individuals Walter Ellis pled no contest to being convicted of murdering those 7 women. And of the 10, the only -- 10 of all the unsolved homicides that the Defendants talked to you about, only 10 were connected to Walter Ellis. The other 3, in addition to the 7 that Walter Ellis was convicted of based on a plea of no contest, were Jessica Payne. Jessica Payne, her homicide -- a man by the name of Chaunte Ott was charged with her homicide. He spent 12 years in prison, and he was later exonerated when the D.N.A. evidence came back that there was D.N.A. evidence in Jessica Payne that implicated Walter Ellis.

Carron Denise Kilpatrick. She -- her homicide was charged to a man by the name of Curtis McCoy. That was Miss Kilpatrick's boyfriend at the time that she died. Curtis McCoy was charged with her homicide, but the system did the right thing, and he was found not guilty. He received a fair trial after that -- after that nightmare began for him, where he was wrongfully charged but he was not wrongfully convicted.

That leaves us the tenth victim of Walter Ellis, Maryetta Griffin. And the murder of Maryetta Griffin and the charges of that murder against William Avery caused him to be

wrongfully convicted, and that is why we are here today. And in addition, in 1998, when Maryetta Griffin -- when Maryetta Griffin was murdered, Walter Ellis lived right across the alley. Walter Ellis lived at 3037 North 6th Street. Maryetta Griffin's body was found at 3032 North 7th.

In 2012 the Wisconsin State Claims Board concluded by clear and convincing evidence -- the Board concluded by clear and convincing evidence that he, William Avery, was innocent of the crime for which he was convicted, and did not by his act or failure to act contribute to his conviction.

The Judge will instruct you in this case after I speak to you, and then I believe Mr. Smokowicz will speak to you, and then you will hear from my colleague, Mr. Stainthorp -- the Judge will read you instructions. And the Judge will instruct you that William Avery must prevail in this case if he proves his claims by a mere preponderance of the evidence. This means more probably true than not. In order for you to find for William, you only need to find that the evidence tips slightly in our favor. More probably true than not. 51 percent to 49 percent.

William Avery was wrongfully convicted of the murder of Maryetta Griffin through the Defendants' actions in creating false statements incriminating him. At the murder trial William was convicted based on incriminating statements that they say he made to Detectives, and that later they said he made to 3

jailhouse informants.

The house of cards built by the Defendants that convicted William Avery started with the false report created by Defendant Detectives Hernandez and Phillips after a claimed approximately 2 hour interrogation. And you know the one, the only report falsely claiming that William awoke with Miss Griffin going into his pockets. They fought. He doesn't remember what happened, but he called Ronnie and told Ronnie that he thought he had killed her. That William said he was responsible, but he just doesn't remember how.

William Avery never made those statements. Common sense tells you that you do not confess to something you did not do. That you could not have done. And make no mistake, the Defendants at that time thought this was a confession. You heard Defendant Hein-Spano yesterday tell you that -- what happened when she first got in to work that day after this false statement was created by Hernandez and Phillips. She heard about this statement, and she was briefed on the tunnel vision of where this investigation was going, to railroad William Avery.

And what happened at 4:30? They met with the homicide prosecutor. They met with Mark Williams. And I submit to you Mark Williams told them for the first time this is not a confession. You gotta be kidding me. This is not enough. They were caught, they were embarrassed, they had to find another

way.

Within months of this incident, William explained this nightmare in his Notice of Claim to the Attorney General. And that was 17 years ago. And he again told you in his testimony from this witness stand in this case. He explained how they spoke to him. That they kept asking me if I killed her. They asked me, did she steal anything from me? They were saying that I knew what happened. They were saying that I did it. They started saying I admitted to killing her. They said Lorenzo and I killed her together, and Lorenzo had already taken a deal. I wanted them to leave me alone. They told me what happened to the woman, what was released in the newspaper. They -- I wanted them to leave me alone, so I told them hypothetically that could have happened, but it didn't. Mr. William Avery kept saying no, no, no. He did not hurt that woman. They created a false statement incriminating him. Defendants DeValkenaere and Hein-Spano created false statements that William incriminated himself by saying he had oral sex with Maryetta Griffin. We know that that is not true, and William did not say that to anyone.

Defendants DeValkenaere, Phillips, Hernandez, and Hein-Spano denied William's request for a lawyer, saying it doesn't work that way, and you'll get a lawyer soon enough. Defendant Hein-Spano admitted to paying money to another witness who testified at William's criminal trial. She told you that.

Hein-Spano admitted that after you heard the testimony of Patricia McCoy that Hein-Spano paid her money.

Defendants Heier and Armbruster, later assisted by Defendants Hernandez and Hein, created false statements that William incriminated himself to 3 jailhouse informants. You heard the testimony of Keith Randolph and Jeffrey Kimbrough that they were fed information by the Defendants. Randolph was promised that he would receive help on his criminal sentence in return for his testimony.

Again, the Judge will instruct you to use your common sense. You know those jailhouse informants didn't agree to testify out of the goodness of their hearts. Defendants Heier and Armbruster admitted on the stand that they provided -- at least that they provided Antron Kent with the name Lorenzo. Defendant Heier observed Antron Kent testify at William's murder trial that he was -- that he, Kent, was testifying in order to do the right thing. And not because he was expecting help to reduce his own criminal sentence.

All 4 Defendants met with these jailhouse informants numerous times to shore up their testimony. Jeffrey Kimbrough and Keith Randolph came into this courtroom and told you their statements incriminating William Avery were false and untrue.

Before his testimony at William's criminal trial, Jeffrey Kimbrough testified to you that he told Defendant Heier he didn't want to go through with it. He didn't want to go

through with testifying falsely. But Defendant Heier told him he had to go through with it. And the issues that the Defendants may try and raise with regard to the additional gruesome details -- the eyes rolling back in the head that were provided supposedly by Antron Kent and Jeffrey Kimbrough. You again can use your common sense. Those details were no secret. Those details were known by everyone. Everyone knew that Maryetta Griffin was strangled. Everyone knows how an individual gets strangled. They're choked. And we all can envision what happens when an individual gets choked. It doesn't make any sense.

Armbruster admitted that Kent wanted a reduction in his sentence. Antron Kent has taken the Fifth Amendment and refused to answer any questions about his testimony. Again, the Judge will instruct you that you may infer that this means Antron Kent fears he may incriminate himself now if he tells the truth.

Police practices expert Mr. Waller told you that jailhouse informant testimony must be tested and reliable. Defendant Heier admitted that a Detective must determine whether a witness statement is usable testimony or, in his words, garbage. All of the Defendants knew these statements of the jailhouse informants were garbage, and now you do, too.

Mr. Waller also testified that a homicide investigation must determine the truth about what happened. And

we know the truth was not discovered until much later in this case with regard to the responsibility of Walter Ellis for Maryetta Griffin's murder. Mr. Waller also explained that a reasonable, honest, and ethical Detective cannot simply decide that a crime occurred in a certain way, reject evidence that doesn't fit, and proceed with tunnel vision. These Defendants had tunnel vision. They rejected all evidence that didn't fit their false theory that William Avery was responsible for the murder of Maryetta Griffin.

And we have great respect for the Police. Solving crimes is important work. We can all agree on that. And particularly with regard to homicide offenses. But the Judge will instruct you that sympathy must play no part in your verdict. Any sympathy that you have for a Police Officer's difficult job must not influence you in your decision in this case.

And investigations -- homicide investigations must not be done with a motivation of clearing cases, but they must be done with an eye for the truth. Not just to justify a report that contains a fabricated false statement by a man innocent of murder. Defendants still remain to this day steadfast that they do not care what the truth is. They continue their tunnel vision to this day. They continue their defamation of William Avery to this day. We are here because the Defendants refused to provide full and fair compensation for what they did, so we

brought this case to trial. To you.

The Judge will instruct you that William Avery brings three claims related to the violation of his due process rights. Violation of due process, failure to intervene, and conspiracy. The Judge will instruct you -- you'll hear these instructions in a bit -- that a violation of due process is shown when, one, a Defendant knowingly fabricated, or created, or made up evidence, or participated in the fabrication of material false evidence used to convict the Plaintiff at trial. And that both the Defendant and the witness knew the evidence against the Plaintiff was false, and that the Plaintiff was damaged as a result.

We know that Defendants Hernandez and Phillips created the March 24th incriminating statement attributed to William Avery. We also know that Defendants DeValkenaere and Hein-Spano created the false statement attributed to William Avery. That he engaged in oral sex with Maryetta Griffin. And in addition, the statements of the jailhouse informants were also used to convict William Avery. Those statements were also false, and Defendants Heier, Armbruster, later assisted by Hernandez and Spano, participated in creating them. All of these statements were incriminating, and all were used at William's trial to convict him of a murder that he did not commit. You absolutely must find for the Plaintiff on the due process claim, because it is at least more probably true than not true.

Before I talk about how William Avery was damaged, let me tell you about the final claim which Plaintiff brings, which is a policy claim against the City of Milwaukee. This claim, as the Judge will instruct you, has to do with the unconstitutional practices of the Milwaukee Police Department in investigating homicides. If you find that evidence in this case was fabricated, you may also find that the policies of the Milwaukee Police Department caused that fabrication.

You have heard testimony from Mr. Waller that these Defendants did not follow reasonable Police practices. It is also clear from what we looked at a minute ago with regard to 10 cases that were connected to Walter Ellis, they got 3 wrong. You have heard that the Milwaukee Police Department did not even train its Detectives, nor was there a bit of policy with regard to the use of testimony of jailhouse informants. Defendant Hein testified to that last week. Absolutely no policies, absolutely no training. A jailhouse informant is like any other witness. Defendant Hein also testified -- Hein-Spano, I'm sorry -- she also testified yesterday she doesn't report or record when she makes payments of money to witnesses who testify in criminal cases.

Defendant Armbruster testified that he would not report or record evidence that he knew could be used for impeachment in criminal trials, or statements that could be used by defense attorneys to undermine the credibility of a witness

who would testify against an individual. A witness who would have a motive other than to tell the truth. A motive such as to gain some personal benefit or consideration. Jailhouse informants.

Mr. Waller explained that a Milwaukee Police Department Officer presented these concerns about inadequate homicide investigations to the City of Milwaukee at their Police and Fire Commission. That those concerns were real, and that a Police Officer himself brought them to the Police and Fire Commission, indicating that there were inadequate investigations. And the concern was to clear cases and not to find the truth, particularly in certain types of homicides in certain areas of the city.

Now, finally, I want to talk to you a little bit about William Avery, and how he was affected by this and damaged by the Defendants. And William Avery back in 1999 participated in the devastating drug culture that we all abhor. This was a decade-and-a-half ago. And as I told you in opening, that is not what this case is about. Defendants have continued to obscure the truth by bringing up the drug charges. The drug activity. The Constitution applies to all of us, even when we are at our lowest.

You heard William testify last week. And it was obviously difficult for him to articulate this nightmare to you with specificity and tell you in clear detail exactly, point by

point, what happened to him. I will tell you this about William Avery. He is a brave man. His trust in people and his faith in the system was clearly shattered by what happened to him. But he is putting his faith in a jury one more time, and that is you. Each and every one of you.

And no one likes to talk about money. They say that that's the number one issue that married couples argue about the most. But our civil system of justice is based on the idea that wrongdoers must pay money damages. Here the Defendants caused William Avery to sit in prison for 6 years for something he did not do. We suggest you compensate him at $1 Million per year for a total of $6 Million. But it is up to you to set the amount. Any amount that you think is fair. You can't give William Avery back what he lost. Nobody can give those 6 years back to him. And we can't undo what happened to him. But you can give him a measure of justice.

Judge Randa will explain to you that if you find any Defendant liable on any of the Plaintiff's claims, then you must set a monetary amount of compensatory damages. And you may award punitive damages to punish the Defendants and deter future misconduct. If you are falsely imprisoned for a crime you did not commit, then you are punished beyond anyone's imagination.

The world is not fair. And it messes with your mind. You heard William describe prison a little bit. The heat, and the cold, the regimentation, the strip searches and being away

from his family. He missed out on holiday and other family gatherings. Seeing his kids. Their life events and graduations. He told you when he was released about the adjustment period. To becoming reacquainted with his now adult children. And most importantly, he told you what it was like to be branded a murderer. And that he will wear that brand like a jacket that he will never be able to remove.

And if William was unable to completely convey how important family is to him, his daughter Cynthia Tyler and Sirena Avery, along with his aunt Debra Fenceroy made that point very clear. William Avery is blessed with a supportive family. His daughters talked about the kinds of things their father does for them and with them. The time they spend together and how William Avery enjoys his grandsons now. They obviously enjoy spending time with him, and they've been doing that since his release from prison. Very often.

Both daughters describe how their father was distraught at being charged with murder, and struggled with issues upon his release from prison. They noticed their father is wary and more reserved. How he has difficulty trusting people.

And Miss Fenceroy is a retired registered nurse, and she described the paranoia she now sees in her nephew. And it was hard for William to hear this testimony, and it's hard to relive this nightmare. And you may have noticed at one point in

Miss Fenceroy's testimony, William even had to leave the courtroom. Count all this in when you are measuring up the price of justice for William Avery.

This is a tragic and gruesome tale, and we mourn the loss of the 10 women whose lives were taken at the hands of the serial killer Walter Ellis. These Defendants compounded this tragedy by causing the wrongful conviction of William Avery.

And you've been very patient, and I will close now, as this is my last opportunity to speak with you. I again thank you for your service and your careful attention. I leave you with a prayer and a plea of justice for William Avery.

THE COURT: Mr. Smokowicz?

MR. SMOKOWICZ: Thank you, Your Honor. Good afternoon, ladies and gentlemen. On behalf of all the Defendants, and Miss Yuan, and myself, I want to thank you for the patience and courtesy and time that you've extended to the Defendants. There's not just one party to this case, obviously. There's not just one interest in this case. There are two sides to this lawsuit. And on behalf -- on all of our behalfs we appreciate that you were willing to spend the time and listen to all of the evidence. Not just some of the evidence, not just one side of the case, as opposed to the other. And that you will fairly and dispassionately consider both sides of the case when you deliberate this matter.

I also want to apologize to the extent that this isn't

Hollywood. Or this isn't working like Hollywood. While this is a very electronic courtroom, and there have been a lot of electronic displays here, there have been times when there's been some pauses, and there probably will be some pauses today during my closing to you.

We're all used to Hollywood productions and T.V. productions. And the way things go in court. And there's all of a sudden one Exhibit, all of a sudden another, and everything is scripted, and answers are short, and witnesses are on for 5 minutes. That's not the way it can and does work in the system in real life.

In order to assist you in this matter in analyzing this -- the verdict that you'll be having to answer, perhaps it is easier to look at that verdict as a framework for you, and to organize my one opportunity to speak to you at this time about the evidence. The days, the waves and waves of evidence that you've experienced in this case.

The first question that you will be asked on the verdict is whether any of the remaining Defendants fabricated evidence that caused the homicide conviction of William Avery. And there will be one place for yes or no for each of the remaining Defendants. Defendant Hernandez, Defendant Phillips, Defendant Spano, Defendant Heier, Defendant Armbruster and Defendant DeValkenaere. I would submit to you that the answer to all of these should be no. And let me explain why. And

let's organize this evidence in that fashion.

The first two people that you hear about in this case, among these Defendants, is Defendant DeValkenaere and Defendant Phillips. The two Detectives at that time who had the opportunity initially to question William Avery. And you are being asked whether they fabricated evidence in this matter. Did they falsely report? Did they falsely create a statement? In their report of their initial interview, 11-A, on the third page they report without equivocation, without reservation, that Mr. Avery at that time denied any involvement in the death of Maryetta Griffin. Period. End of story.

They're being -- particularly Detective DeValkenaere, is being accused of falsely reporting here not the fact of sex, but the statement -- the statement by Mr. Avery at that first interview where he doesn't talk about being involved in this drug house. Where he minimizes his involvement in that matter. Where all he says is effectively that he frequents that house. Or he's gone there from time to time. And that he has his cousin, who lives there and owns the house -- he didn't say anything about operating the drug house, but he does say -- at least he says and they report he says -- that he had sex with Maryetta Griffin.

You heard Detective DeValkenaere. He has no memory particularly of this interview 17 years later. But he said look, if he said it, I'd put it in the report. If he didn't say

it, I wouldn't put it in the report. If there is an effort to fabricate evidence to cause a conviction of William Avery in this case, as opposed to other people who you know were at that house that night and you know, therefore, could have had contact with Maryetta Griffin -- and that would have included Lorenzo Frost and Lucious Goins, perhaps, and Terry Bryson. A person you will hear about in a minute a little bit more. Boyfriend of Maryetta Griffin.

There has been no evidence of any motive on the part of these two Defendants or any of the others, for that matter, as to why they would choose to pin any kind of charge on William Avery at all. With respect to harming Maryetta Griffin. Furthermore, if there was an effort to do that sort of thing, there is no evidence that a report like this, which would tend to undermine that, and which would tend to support Mr. Avery's position, was in any way hidden from him or his criminal defense lawyer at the time of the homicide trial.

And please bear in mind when you think about thoughts, or attempts, or whatever, or practices, or what have you of coverups, or certain coverups -- look at the bottom of this page. M-3431, Section 4, Page 20 -- and I don't know if that's 2 or 7, because I'm just reading it off the screen here. But the point is, this is the homicide file. It has its own number, 3431. This is a section of that homicide file. Section 4. And every page, you heard testimony yesterday, is sequentially

numbered. And if there's something missing, if there's something taken out, it's obvious to see. But in any event, there was no deep-sixing. There was no effort, there was no action on the part of Detective Phillips or Detective DeValkenaere to hide, to keep away, to work on a fabrication here of a statement from William Avery.

Next. Next, of course, comes the statement of Mr. Avery himself. Let's take a look at that again. As I said, not Hollywood. Sometimes the documents are not quite where I expect them to be. Mr. Avery's statement, as you may recall, and you will have the opportunity if you wish to look at it, as has been pointed out, does not say this is how I did it. Does not say her eyes rolled back in her head. Does not even say I choked her. None of those things are in there. In fact, what's in that statement is a recounting of I fought with her. I had a fight. Something happened. I grabbed her. I don't know what happened after that. There's nothing about wrapping her up in a rug. There's nothing about her being partially naked. None of those things are in there. None of those details.

The accusation is that knowing the facts of the crime scene, that Detective Hernandez somehow just simply wrote out a statement out of his own thought processes about how this, quote, might have happened, close quote. And purported that to be words that William Avery said to him. That makes absolutely no sense here. It makes no sense, given what you know happened

beforehand in terms of the denial that's reported, and reported honestly. It makes no sense in the sense that it's not completely detailed. If you're going to -- if you're going to fabricate a confession, why would you fabricate (a) a confession that's not complete, or (b) a confession that -- a confession that you have no reason to -- as to Mr. Avery, as opposed to Mr. Frost, Mr. Goins, Terry Bryson -- why would you -- why would you pick him? There's been no evidence of any kind of motive here to do this.

There has been evidence that Mr. Hernandez -- that Detective Hernandez wrote what William Avery said. That he did so in a situation where there was no evidence of hours and hours and hours of questioning. It wasn't the 9 hour period in the third interrogation. It wasn't the longer interrogation in the first questioning session where it was just witness question. The moral to this story is that statement with all of its limitations was not enough. The case would not have gone anywhere. Detective Hernandez says he took it to the D.A. for only one reason. To administratively clear it. Because he knew this wasn't going to go anywhere. He knew it wasn't enough. He knew it wasn't a confession. And that's where it would have ended.

There it is. There is the statement. There is the statement, with all of its limitations, in two-and-a-half hours. And you know later that same day Detective Spano and Detective

Hernandez attempted to speak to Mr. Avery, and he exercised his right not to talk to them. And that's reported. That's not contradicted. There's no statement here -- no fanciful, no made up, no details here, let's add in how it happened kind of statement. There's nothing indicating fabrication. An intentional fabrication by these Officers.

Later on the 23rd -- on the 24th, I'm sorry, and into the 25th in a much longer statement or interrogation do these Detectives produce a statement of a fabricated statement? Fabricated evidence that -- in which Mr. Avery says I did it, and this is how I did it? They don't do that. Instead, they report on Exhibit 1031 that he states the last time he saw the victim alive was on Monday evening at about 7:00 p.m., and that he cannot remember ever seeing her after that. And that he does not believe he was involved in the death of Mercedes, because when he passed out on the couch, the only person in the house was Keisha.

This is evidence not of fabrication. This is evidence of taking whatever statement and honestly reporting whatever statement is provided to them from Mr. Avery. Furthermore, perhaps in some ways most importantly, to assess this case of diverse Officers at diverse times and at diverse circumstances, somehow each and every one of them working to convict an individual by fabricating evidence?

There is the August, 1998, blood test result that is

on page -- begins on Page 23 of Section 9 of the M-file. And as Captain Heier testified, a copy of each and every page in that file, including each and every page in the lab report section, is copied and brought over to the prosecutor. And a second copy is brought over at that same time for the defense lawyer.

So I submit you need to inquire if it's more likely than not that somehow these and other Officers are fabricating evidence, why they would include a test result that was received by the Milwaukee Police Department in 1998, in September, 6 years, 7 years before any prosecution of William Avery? And thus, long before any need to turn over this file existed. And when it happened -- and what's in this? Not only excludes William Avery, and Lorenzo Frost, and Terry Bryson from certain things, but it also reports that there's a foreign D.N.A. of someone else that's not known. Doesn't that -- isn't that powerful evidence to ensure that William Avery could have had a fair trial? Isn't that honest reporting of both what one group of people says, the jailhouse informants, reporting that William Avery said something to him? And on that same time that William Avery made some admissions on one occasion? And at the same time there is this evidence that there's somebody else out there.

If there is an effort to fabricate evidence, if there's an effort to frame, in effect, William Avery, this is the last kind of thing that a -- what is really being described

as nefarious Police Officers -- you know, people who are -- who are -- my goodness, not just -- not just putting blinders on, but intentionally trying to create a case. Why would they -- why would they give tremendous evidence like this, which Miss Lankford didn't talk about in her questioning. Sharon Polakowski, the person we brought in, who did this test, brought this out. And Miss Lankford only mentioned it on her cross examination.

Now, William Randolph's statement. First of all, when you're talking about William Randolph, and Antron Kent, and Jeffrey Kimbrough, the Plaintiff in this case, Mr. Avery, is asking you to believe, what? Them now? When they say they lied and they were told to lie by the Police? When they wrote out -- when they signed statements that said something? When two of them went to court and raised their right hand and said something? And now they're believable? If they do that again? That's the basis for their case, is that somebody who says I lied when it was convenient once, I lied when I thought it would help me once, now says well, I'm in prison. I was threatened in the past. Actually that was a lie then, and now it would be truthful.

I ask you to consider that their testimony about the Defendant Detectives is simply not credible evidence to support a case against these Detectives, who had no reason whatsoever to frame, to fabricate evidence, to intentionally -- and the

instruction that you're going to be given here on this is that the Defendant Detectives knowingly fabricated or participated in the fabrication of false and -- material false evidence. That the Defendant Detective and the witness each knew the evidence was false. Rather, what I submit to you is that the Defendant Detectives had no reason to fabricate.

That Detective Heier had no reason, no prior contact with this case. All of a sudden he gets contacted by an attorney for Mr. Randolph, who's got a story. Maybe that story came from the newspaper. Maybe it came from some discovery that Mr. Randolph saw. But did Detective Heier conceal that in the report? No, he did not. And as a matter of fact, those two items appear right there on the first page of the report that Detective Heier prepared. For any defense lawyer to see. Look, Keith Randolph saw some newspaper article. That's obvious. All you have to do is look in the newspaper article that's in the homicide file. Keith Randolph saw some discovery. All you have to do is talk to Mr. Avery and ask him what did Keith Randolph see? He saw these documents. This is what he saw.

Captain Heier, then Detective Heier, did not conceal anything. He took his statement from the man who said to his attorney I want to talk to the Detectives because I have information about a family friend who committed a murder and who admitted it to me. That's not the stuff of some Detective running out, looking randomly for a witness who's vulnerable and

willing to say anything and saying hey, buddy, I'll do this for you if you -- you know, if you just say something for me. This is somebody who comes to him through his attorney, after he's told his attorney what he has to tell the Police. And whose attorney stays there for awhile, for a couple of hours, so he can tell the Police Detective what he has to say about this homicide.

And even with this, even with this statement by Keith Randolph, as Captain Heier explained to you, there was still no prosecution. There was still no basis for a homicide charge. Where does this case rise and fall in terms of the homicide charge? It doesn't come into existence. It doesn't get filed. Nothing happens until Antron Kent calls, out of the blue, from several states away, never having had any contact with any of these Detectives and says I have some information from an inmate here who tells me he beat a murder rap, and is telling me some details about how he did it. And ends up conveying those details to Detectives -- to a Detective who had never worked on the file, who wasn't looking for anyone, who wasn't trying to figure out who killed Maryetta Griffin in 2002. And, in fact, just starts writing.

This is also not the stuff of someone who is fabricating evidence. Antron Kent took the Fifth. Antron Kent took the Fifth about whether or not he lied to the Police. Whether or not the Police provided him with any promises.

Whether or not the Police gave him any details. Why? Because that would all incriminate him. Because he did lie to the Police. Because they didn't give him details. Because they didn't make promises to him. They didn't have to.

Now, where did he get the information from? Apparently he got it from somewhere that no one has been able to figure out. Could it have come from, as he said, in his report? Or in his statement? He thought well, William Avery was just bullshitting? Just making up a story, trying to look tough in prison? Talked about a murder? Had some details? Details that are not in the statement. Details that may have been made up.

And Jeffrey Kimbrough got up there and said on this stand, yes, I lied. But not only did he say I lied in that criminal trial and in those statements, he says every one of those lies came from Antron Kent. Not the Police. Antron Kent. With the exception of a couple of details that he threw in there to make it a more convincing statement. He said that. And there's been some insinuation that he's not -- he's not intellectually capable or whatever. But he had all of those details on more than one occasion. He testified in the criminal trial. He maintained a story in that criminal trial. And he came in here and answered every question and appeared to understand every question and answered.

But the crucial thing he says is that information did not come from a Detective. It came from Antron Kent. Those two

men, those are the culprits. They are the people who are not sitting in that defense table and should be. Not good, hard working, well meaning, dedicated, honest Police Officers. But two culprits. Two people from Oklahoma who never, never, never did anything but lie. And lie convincingly, unfortunately. They are the ones who caused Mr. Avery to have a homicide trial. Not Detectives conspiring. Not Detectives getting together. Not Detectives putting together some kind of story. They didn't have -- this is -- this is ridiculous in terms of a claim that they put together a story. Who put together the story? Those two men in Oklahoma.

There's no evidence that -- there's a claim, there's an argument, but there's no evidence that on the subsequent occasions when Detective Spano and Detective Hernandez went to see them, or when the former Defendant in this case, Detective Gulbrandson, went to see Kent on the last occasions, and Detective Heier, that in any of those situations they were told the story or re-told the story by the Detectives. None of that evidence came in. They had a story. They had a story to keep. They kept that story, even when they went to separate prisons. Green Bay, Minnesota. Talked about separately.

Talking about being hoodwinked, talking about checks and balances, you're going to be instructed that you can disregard testimony of an expert. Dennis Waller. A man who has never run a major metropolitan Police Department. A man who

has -- who says he did a couple of homicide investigations, but really didn't provide you with any details. Now, being a Police administrator can be something you can learn about to some degree, but it's not like being a Professor of physics. It is something where it is much more akin to being a Professor of a practical science. Or a teacher of a practical science. The more you do, the more responsibility you have. The better you are, the more knowledgeable you are.

He says well, they missed the boat on Walter Ellis. There's a pattern of stars here. He doesn't ask about any other homicides. You heard that yesterday from Detective Spano. There's 19 others, just women, prostitutes or drug related, on that same map that weren't shown in there. There's no apparent pattern.

In terms of -- in terms of what a -- what a policy or what a procedure would look like, Mr. Waller doesn't suggest any of that. He didn't have a pattern policy. He didn't have something where he could say okay, this is line 3 of the Milwaukee Police Department policy, or the Chicago Police Department policy, or the Los Angeles Police Department policy, or something like that. Or the International Association of Chiefs of Police policy. Their suggestion on how to deal with jailhouse informants.

If something like that existed, do you think he would have brought it? Of course he would have. Of course he would

have. Because he didn't want to admit that what was unusual about this situation, what made this situation believable, was that three different individuals who did not -- two of whom knew each other, but they didn't know the third person, and vice versa, in three -- in two different institutions, and then later three different institutions, because Kent and Kimbrough were separated, had a recounting of a confession by William Avery.

Now, what happened that night, as Detective Hernandez says, we'll never know. We don't have all the details. Pieces are missing. Maybe there was a fight. Maybe somebody got -- maybe Miss Griffin was actually injured, knocked out, what have you, taken out. And then encountered, God forbid, Walter Ellis. And perhaps, because in the light of day, after that, William Avery felt guilty. Felt responsible. Even though, as he ultimately said, I didn't kill her. But all of that is in there, including crucial D.N.A. evidence, back in 1998. This is not the stuff of an effort of 6 Defendants to fabricate evidence to convict a person of homicide.

So going back to this verdict form, question one, in all of the parts, "A" through "F", should be answered no. There is an instruction that if you do that, you do not need to answer any of the remaining questions.

Question 2 just asks you about did they -- did any of the Defendants fail to intervene to prevent the use of fabricated evidence? And lists the same Detectives. You do not

need to answer that question, because none of them fabricated evidence.

Question 3, did any of the Defendants conspire to use fabricated evidence? There is no evidence whatsoever of a conspiracy here, I would submit. And in any event, because you answered no to Question 1, you do not need to answer Question 3. Something that has not been addressed in the initial statement of closing by Miss Hoft.

Question 4 talks about the policy, practice, or custom. You will hear that that is defined by the Judge in a particular way. And if I can just have a second, I will get to that. But one of the things that you will hear, that you can find a policy based on, is something that the Chief did. There's no indication that any Chief of Police did anything, issued any policy statement, or any regulation by the City's Common Council.

Last is a custom of investigating inadequately homicides at the time in question that led to the fabrication of evidence that was persistent and widespread so that it was the City of Milwaukee's standard operating procedure. There has been no evidence of that except for one complaint by a Detective about one matter that you've had virtually no details from. That it involved "X" number of cases, and a hundred homicide cases, or these 20, or these 50, or anything of that sort. And certainly nothing about that the entire Homicide Division was

practicing that.

Because you have answered Question Number 1 -- or I submit you should answer Question Number 1 no, you do not need to answer the question on damages. However, this is my only opportunity to talk about things in this verdict. And so I must take the opportunity to address this. Cannot -- we cannot fail to at least talk about this. With respect to that Question 5, compensatory damages, Plaintiff has suggested $6 Million. Other than talking about the fact that Mr. Avery suffered some humiliating -- admittedly humiliating times in prison, while he was in there for homicide, and while other than talking about the fact that he was certainly separated from the freedom of life and the freedom of dealing with his family, there is nothing particularly concrete, scientific, about the number of $6 Million. No number that can be suggested here is that way.

I would suggest $750,000 if you have to answer that question. There is really no way to explain one particular number over another here. So there has been some evidence about Mr. Avery's family life, and the loss of his family connection. What hasn't been addressed, of course, was the evidence indicating that Mr. Avery had all kinds of problems before he even went into prison the first time on drug charges. That he was an addict. That he was an alcoholic. That he did not have a very good family relationship then.

Lastly, there's a question here about punitive

damages. We would submit that there has been no showing of the kind of intent that is required to answer that question as to any of the individual Defendants. The Court will instruct you about punitive damages. And the Judge will explain to you that in order to assess those, you must prove by a preponderance of the evidence that they should be assessed, and that the Officers' conduct was malicious or in reckless disregard of the Plaintiff's rights.

Once again, there has been no evidence of malice here. There has been no evidence of why -- of any of these Officers ever knowing William Avery before they either interviewed him or got involved in this case. There's no evidence of malice. There's no evidence of any indication of reckless disregard of his rights.

As Detective DeValkenaere has said, what he wrote is what was said. And that's all these Officers did. In that regard, in terms of whether it's an honest report of what was said, they reported what was said. Thank you very much.

THE COURT: Mr. Stainthorp.

MR. STAINTHORP: Thank you, Judge.

THE COURT: You maybe want to take this off the screen?

MR. SMOKOWICZ: Oh, I'm sorry, Your Honor.

MR. STAINTHORP: Good afternoon, ladies and gentlemen of the jury. What we're going to ask you to do in this case,

and what we've been asking you to do throughout this trial, is follow the evidence. The evidence in the case. Not what might have been. Not what someone imagines might be some piece of the puzzle that after 17 years hasn't been found. But what are the facts in the case? We are asking you to follow the evidence.

Ms. Hoft talked to you about the burden. Our burden of evidence. That we have to show that it's more likely than not. That's it. It's not beyond a reasonable doubt. It's not the standard Mr. Avery had to satisfy to get his certification of innocence from the State of Wisconsin that was clear and convincing. Here it's a preponderance of evidence. And actually if there's a piece of the puzzle that you think you don't have, and you would like to know, believe me, these attorneys have been working on this case for years. People have been working on this case for years. If there's a piece of the puzzle that you haven't been presented with, it doesn't exist.

You are deciding this case based on the evidence, not based on some imagined incident that occurred on February the 16th to the 17th. Not on what might have happened. Is there was a fight, and then Ms. Griffin was injured, and then she was taken out somewhere, and then she happened to fall into the clutches of Walter Ellis. No. You're deciding on the facts. And the Judge will actually instruct you on what is evidence, and what is not evidence. Someone's imagination as to what might have been is not evidence.

So we want you to follow the evidence. We want you to follow the evidence as to the jailhouse informants. And I know you've been listening a lot this week to what the jailhouse informants said about Mr. Avery. And it's tough to listen to. It is tough to listen to. Because when you see that evidence on the surface, it sounds terrible. It's awful. I mean, they're describing a murder. And they're describing Mr. Avery admitting to that murder. But I just want to be sure that you realize that all of that, all of those statements which were gone through in excruciating detail here, are all worthless.

We know that the statement of Mr. Kimbrough and Mr. Randolph are worthless because they came in here and they said it. And apparently the Defendants accept Mr. Kimbrough's testimony. We also know that Antron Kent's statement is worthless. It's worthless because he wouldn't even come in here and testify. He just took the Fifth Amendment, so it was pointless to bring him in. So we just read his deposition.

But there's an interesting thing, actually. And in the Notice of Claim -- I'm sorry, the Claims Board decision that was -- this was the decision in which the State of Wisconsin found that Mr. Avery, by clear and convincing evidence, is innocent. And I just want to call your attention to one portion of this, where we know what Mr. Kent would have said if, in fact, he had come in here.

MR. SMOKOWICZ: Your Honor, I'm going to object. This

is hearsay.

MR. STAINTHORP: Judge, this is in evidence.

THE COURT: Well, the document is in evidence.

MR. STAINTHORP: So this is the evidence in this case. This is the Claims Board decision, which states one of the inmates who recanted --

THE COURT: Let me just correct that. It's the evidence in that case. The Claims Board.

MR. STAINTHORP: Yes. Yes.

THE COURT: Not in this case.

MR. STAINTHORP: Absolutely. But obviously -- yes. One of the inmates who recanted, Jeffrey Kimbrough, also stated that the third individual who testified against the claimant, Kimbrough's cell mate, had told Kimbrough that he was lying about the claimant in order to get a reduced sentence. So we know from this that Kent had already admitted to Mr. Kimbrough that he was, in fact, lying. So all of these jailhouse informants, all of their statements implicating Mr. Avery, are worthless.

Now, we want you to follow the evidence as to Mr. Avery's innocence. And frankly, after this trial I was unsure what position the Defendants were going to take, because they'd never explicitly said, is Mr. Avery innocent? Is he not? I believe we have now heard a statement by the Defendants that they acknowledge that he is innocent. But just -- I will --

since I didn't think that was absolutely crystal clear -- I mean, you heard the evidence. You know the evidence. There's no physical evidence tying Mr. Avery to the murder of Mercedes Griffin. No D.N.A. No evidence from the search of 2474 North Palmer. No evidence from the search of the Blazer. Lorenzo Frost's Blazer. That the evidence from people who were there in the house supports Mr. Avery.

Lakesha Kent, also -- Lakesha Hall, I'm sorry, also called Kenya Hall, her evidence. She was there in the house that night. She was there on February 16th. No fight. Nothing happened. Maryetta Griffin was there earlier in the evening and left. Precisely what Mr. Avery said.

Rhondalyn Scott. Remember we heard some evidence about that. Rhondalyn Scott. Another prostitute who knew and was good friends with Mercedes. She said she'd seen her out on the street. Out on the street late at night on February 16th. So shortly before she was murdered. She'd seen her out on the street. Lorenzo Frost. No evidence that he was in any way involved in this homicide.

And then, of course, we have at the D.N.A. evidence with respect to Walter Ellis. So the sperm that was found in Mr. Ellis's (sic) mouth. The pattern of homicides. Very similar homicides that had happened across northern Milwaukee. The north side of Milwaukee over several years. And then, of course, we have the evidence that Mr. Ellis -- and Mr. Ellis

living right across the alley from where the body was found. I mean, maybe 50 feet away? That's about it. So we have that evidence.

We actually have -- I believe Mr. Avery's request for D.N.A. analysis. You've seen that he is the one who initiated the request for D.N.A. analysis. Two things from that. First of all, why on earth would he request D.N.A. analysis if he believed there was any possibility that his D.N.A. would be found on Mercedes Griffin? Any possibility. I mean, he would know that with D.N.A. examination, if they find your D.N.A. on the victim, you're sunk. You're done. You're over. So it shows that. Why would he ask for D.N.A. analysis if, in fact, he had any involvement?

But more precisely, more additionally, why would he ask for D.N.A. analysis if, in fact, he'd had oral sex with Maryetta Griffin on the 16th? He would know that that would show up. But, of course, it didn't show up. It didn't show up, because it didn't happen. The statement about oral sex, although obviously not as important as the statement about the murder itself, that statement was also false, and that statement, which was acknowledged to be inculpatory by Defendant Hein, that statement which tied Mr. Avery even closer to Ms. Griffin, that was a false statement. And, of course, we know that the State of Illinois (sic) has now acknowledged that Mr. Avery is innocent.

Follow the evidence. Follow the evidence, even if it contradicts your hunch. That is what Mr. Waller, the expert told you. Now, sure, he hasn't been head of a big Police Department. He's been in this field as an academic. Studying the area. A consultant in the area. For what? 30 years? He's been certified as an instructor by law enforcement agencies. He's got to instruct law enforcement agencies. He has the expertise. He knows what he's talking about. And what he says, follow the evidence.

And the biggest problem with Detectives is when you have that tunnel vision. And you start thinking that you know what happened. Is it okay for Police Officers to have hunches? Have suspicions? Of course it is. Of course it is. Can Police Officers have theories in the case? Of course they can. But what they cannot do is make the evidence -- fabricate the evidence, create the evidence, to fit their theories.

Here you had the opportunity to see Defendant Hernandez. And Defendant Hernandez showed you on the stand that he does not follow the evidence. He follows his preset ideas. His unsupported theories. Faced with the evidence of the semen in Walter -- Walter Ellis's semen in Mercedes' mouth, he didn't follow the evidence. Faced with the fact that Walter Ellis lived across the alley from where the body was found, Defendant Hernandez did not follow the evidence. Faced with the finding of the State of Wisconsin that Mr. Avery is innocent, Defendant

Hernandez did not follow the evidence. He still feels that he's guilty. So he's not following the evidence. Faced with the accounts of the people who were with Mr. Avery on the night of the 16th, which fully supported his alibi, Defendant Hernandez would not follow the evidence.

Faced with the fact that all of the jailhouse informants have either recanted formally in testimony or have told others that they lied, he did not follow the evidence. Faced with all of this evidence, Detective Hernandez did not follow the evidence. He told you he thinks William is still guilty.

Let's look at the crucial interrogation. The March the 24th morning interrogation. Phillips and Hernandez go into that interrogation. Very suspicious of William. They think he's involved. First of all, he's an obvious target. He's running the drug house. Okay. A terrible -- a terrible thing to do. He's running a drug house. He's involved in illegal activity. Secondly, he undoubtedly was with Ms. Griffin the night before she's murdered. No question about that. He's always acknowledged that.

Third thing they know, that Mercedes is murdered. Not an accidental death. She's murdered. Phillips has this theory that when prostitutes are victims of homicide, they often are the people who have initiated the criminal activity, by trying to rob the person they were with. He's going in with that

perspective. Phillips used hypotheticals, where he would suggest to people he was interrogating what might have occurred.

Now, Detective Hernandez -- let me just finish this thought, and I'll get to Detective Hernandez. The Detectives also believe it's very suspicious that Mr. Avery, in his prior statement to the Police, had said he knew about -- that Maryetta was dead early in the morning. 8:00, 8:30. Something around that. And they say well, the body wasn't reported until 11:00. So that's highly suspicious.

Of course they're wrong. There's a Police report which I brought out, showed them. The body was discovered by 8 o'clock in the morning. So it's perfectly understandable that he would know that she's murdered by 8 o'clock in morning.

But to go back to Detective Hernandez. Detective Hernandez told you in his second round of testimony, the one where he remembered stuff, that he would not use hypotheticals. But I then read in a portion of his deposition. Okay -- and this is talking about the March the 24th interrogation. Okay. Did you provide any details to Mr. Avery about the homicide or anything you knew about the investigation? Answer: I don't remember what exact details I gave back then. Okay. Did you give any -- Mr. Avery any false details about the investigation to try and elicit a confession? I don't remember. Okay. You may have done? But you don't recall? I could have, but I don't remember. Question: That would have been one technique you may

have used to obtain a confession from a suspect, correct? Answer: I find that, yes, correct.

So Detective Hernandez did use that method of providing information to suspects. He acknowledged it in his deposition. He denied it up here. But he did use that method of supplying information to his suspect.

We look at this interrogation. It's very dissimilar to the other interrogations in this case. It's very short. It's two-and-a-half hours. We know that the previous day the interrogation, with some breaks for other things, went from 11 o'clock in the morning, to 7 o'clock at night. So 8 hours. We know the interrogation later that day went from 5:30 at night to 2:30 in the morning. About 9 hours. This one's two-and-a-half hours. It's incomplete. And yet there's no indication in any of the reports that William at any time cut that off. Nothing written saying Mr. Avery would no longer answer any questions. Nothing in any of those reports. And, in fact, when asked at his deposition, why did the interrogation end? Detective Hernandez says -- well, he's asked. Question. Do you have any recollection as to why this interrogation came to an end? I don't. I don't. Now on the stand he said something different. On the stand he says oh, Mr. Avery wouldn't answer any more questions. That's not what he said at his deposition. He said he didn't recall why it ended.

We also know -- well, let me actually go straight into

that interrogation. We actually do know how the interrogation proceeded, and we know it because of the Notice of Claim filed by Mr. Avery in November of 1998. And that's the Notice of Claim that was mentioned by Ms. Hoft in her closing. He describes what happens. He says the Detectives suggested to him that Mercedes stole from him. That the Detectives suggested to him that he and his cousin, Lorenzo, did it. The Detectives in -- that he describes in his Notice of Claim how the Detectives said they were suspicious of him because he knew about the death before supposedly the body was found.

He described how hypotheticals were used in the interrogation, and how he would agree to use them, but then would tell the Detectives it didn't happen that way. The Notice of Claim describes how the Detectives suggested to him that there was a bond between him and Lorenzo. Described how the Detectives suggested that he blanked out and didn't remember. Apparently they learned that at one point he'd been -- he had a head injury, and so then they suggested well, did you blank out? Is that how it happened? They suggested to her that Mercedes, Maryetta Griffin, fell down the stairs and broke her neck. They suggested to William that he called Ron and said I think I killed the bitch.

Now, as I just said, at his deposition former Detective Hernandez said he didn't know whether he provided any information to William. Now, of course, in the second round of

testimony, he says he does know, and he denies it. But I think you will find that former Detective Hernandez is not a reliable witness.

One other thing I want to address before we leave that portion of the 3/24 statement. There's an interesting portion of the statement, and it's the portion of the statement where, according to Detective Hernandez and Detective Phillips, that his cousin, Lorenzo Frost, called the house. And according to the statement, it's at that point that Mr. Avery, according to this, said to Ronnie get over here. I think I killed this bitch.

Okay. Obviously we'll get to whether that's inculpatory or not later. But that's really interesting, because now, up until this point, we know there's no recording, so there's no one taking a video, no one taking audio, no stenographer. No -- the person not being asked to write it out themselves. So there's no -- there's no way of checking out whether this was, in fact, said. But now there is. Now there is a way of checking out what was said. Because if there was a phone call made, there's going to be a record of the phone call. You go get the phone records. You go see, was there a call from Lorenzo Frost to the house at 2474 North Palmer on February the 16th? And of course the Police would do that. Of course investigators would do that. And there is no evidence in this case that there was any record of any phone call being made from

Lorenzo Frost to that house. Nothing. So we know that this statement is completely false.

Now, obviously in this case, second time around, Detective Hernandez claimed that he had knowledge. He had information about the 3/24 interview. And the classic way to determine reliability of a witness is you take their testimony at one point, and you compare it to what happened at another point. And I submit to you that when you compare Detective Hernandez's testimony, you will find that he is not a reliable witness.

When I first -- when I put Detective Hernandez on the stand in our side of the case -- and this happened so fast you might even have missed it. I knew what he said in the deposition. I knew he said in the deposition I have no recollection of the interview of Mr. Avery on March 24th. Other than the fact he did recall that he got emotional. Although that's not in his report, by the way. But he had claimed at his deposition he recalled that.

So you might even have missed it. Because it was a single question. Detective Hernandez, you don't have any recollection of the 3/24 interrogation, is that correct? That's correct. That's what he said. I knew from his deposition that he had said at his deposition that he essentially had no recollection, substantive recollection, of interviewing the jailhouse informants. So again, it's a single question when I'm

putting him on. Detective Hernandez, you don't remember the substance of the interviews you had with the jailhouse informants, do you? No, I don't. That was last week.

When he came on in his side of the case, and suddenly started coming out with this font of information, I'll tell you, I almost fell off my chair. How could this guy -- I'm sorry. How could this person, who the week before had told me he had no recollection of the 3/24 interview, he had no recollection substantively of the inmate interviews, how could he suddenly come out with this very detailed account of both the interrogation, and both -- and going off to interview the inmates?

And then on the second time around, after he testified to you, he represented to you this was his memory. That was his testimony. He didn't represent well, I -- you know, I don't really remember, but my report says this. No. He represented to you this is my testimony. Then, when I got up to cross examine him, he acknowledged well, it's not really my memory. Some of it is, and some of it isn't. I said well, what is and what isn't? Well, I can't really identify that. So some of it is from the report. Some of it I remember. But I can't tell you what it is.

So he misrepresented to you. He told you some things that were not reliable, in terms of his testimony. He created his testimony to suit the results. He created his testimony to

reach his goal. He created his testimony to manipulate the truth. The same way he created the testimony of William Avery. He created the statement of William Avery on March the 24th to support his hunch. He did have a hunch. He thought William maybe was involved. But he then created the evidence to support his hunch.

Now, why is innocence important in this case? It's important in this case because if Mr. Avery is innocent, the 3/24 statement is impossible. Mr. Smokowicz has suggested that it's not inculpatory. Okay. I'm sorry. A person is murdered. A person who is a suspect then supposedly says I got into a fight with the person who's murdered? Then supposedly said I was struggling with the person who was murdered? Then calls up his friend and says I think I killed the bitch? Then describes moving the body? That's a highly inculpatory statement. True, it may not meet the standards of a full scale confession. Doesn't have details, that's true. But it is highly inculpatory. It's impossible. Why would a person who's innocent make that kind of statement? It just can't be.

You don't leave your common sense behind when you come into a jury box. Common sense tells you it cannot be that a person in a very short interrogation, not describing -- not describing physical abuse, not describing any extent of mental coercion, that someone would make this highly inculpatory statement? Mr. Smokowicz said oh, it was no big deal to make

the statement. Well, Detective Hernandez in one of his few moments of candor on the stand? Admitted that that statement was the most inculpatory piece of evidence against Mr. Avery at his criminal trial.

We know that Mr. Avery is innocent. If Mr. Avery is innocent, then that statement is impossible. Look at what it caused. It went to the D.A. It concentrated suspicion. The D.A. is believing that this is a reliable account by the Police Officers. The D.A. relies upon Police Officers being reliable. D.A. relies upon it, but says -- actually, look at that. After the statement, Detective Hein goes to see D.A. Williams. He's the homicide D.A. Why would she go to see the homicide D.A. if they don't consider this statement highly inculpatory?

Then they attempt to do a more extensive investigation. Detective Hernandez on the stand tried to tell you well, that later interrogation on the 24th? That didn't have to do with the murder. That had to do with the operation of the drug house. That's complete rubbish. Plaintiff's 11-F is the account of that interview. True, the first page, or about two thirds of the first page deals with how the drug house operates. Page 2, all about Maryetta Griffin. Page 3, all about Maryetta Griffin. And all the way up to the end, all about Maryetta Griffin. So Detective Hernandez, trying to tell you that this interrogation didn't deal with the murder of Maryetta Griffin is hogwash.

So the damage -- let's follow the evidence. Let's see what damage this statement did. It concentrated suspicion on Mr. Avery from the D.A. The D.A. says they need more evidence. They go back to try and get more evidence. They don't get any evidence that -- from Mr. Avery that he's involved with the Griffin homicide. So the day before they don't have any significant evidence. The same day later, they don't get any significant evidence. The only time they claim to get any significant evidence is this one very strange 2 hour, 2-and-a-half hour interrogation.

We know that the other damage that's caused by this statement, it gets released to the newspaper. And you've seen that report. We've seen the report. 1042, Exhibit 1042, man admits to killing, report says. So while Detective Hernandez can say well, isn't about the murder. While Mr. Smokowicz can say oh, this wasn't a big deal. The newspaper sure as heck recognized it was a big deal. Man admits to killing. Because that's what happened, according to the statement. This was absolutely an admission to killing. Any attempt to minimize it is just absurd.

So it's published in the newspaper. Mr. Avery's picture is in the newspaper. Other Police Officers rely upon this Police report. Inmates see it. The jailhouse inmates see it. They can make up stories. Used to bring a homicide charge. It's used at the trial. It's not like the D.A. said oh, I'm not

gonna use that evidence, you know. True, it has some defects, but the D.A. -- absolutely. That was the star -- that was the centerpiece of the evidence. Man admits to killing. So any attempt to minimize the inculpatory nature of that statement is absurd. It's used to convict Mr. Avery. It's used to sentence him to 40 years in prison. And that statement, that false statement, causes this whole cascade of events that ends up with Mr. Avery facing essentially the rest of his life in prison.

Briefly, the policy claim against the City of Milwaukee. You have evidence here mostly about -- you have -- most of the evidence you have is about 10 cases. As Ms. Hoft said, the 10 cases that were -- that were eventually linked to Mr. Ellis. As Ms. Hoft said, 3 of those, 3 out of 10 turn out to be wrong. There's a 30 percent failure rate in these homicide investigations. That's significant evidence of a policy of flawed investigations on the part of the City of Milwaukee.

Also, you saw some of the reasons why. You saw that Detective Hein-Spano -- oh, yeah, I gave money to people. But I -- you know, I gave money to cooperating witnesses, but I didn't record it. You heard from Ms. McCoy. The Defendants' own witness. Yeah, I was cooperating, and I do controlled drug buys. And then I get to keep the drugs. Never reported.

When Detective Armbruster, up there -- he seemed to think it was amusing that he didn't record impeaching

information. He, of course -- he said well, yeah, I didn't record that Antron Kent was looking for benefits in this case. I knew it was impeaching, but I didn't record it.

Defendant Heier. Now, Defendant Heier, he was told by Mr. Kimbrough I don't want to go ahead with testifying because it's not true. What could be more significant impeachment evidence than that? A witness telling you it's not true. Yet he made no record of that. He did not advise anyone of that. That's how these false convictions occur. Then Defendant Heier, sitting there in court, as the Court Detective during the trial of Mr. Avery, hearing Antron Kent testify that no one -- that he never requested benefits for his testimony -- but we know from Detective Armbruster he did. Detective Armbruster said oh, yeah, yeah. He was asking -- he wanted to get his prison term reduced. Heier sitting there, hearing this, does nothing.

In fact, what Defendant Heier does is perjure himself. He was asked -- and this is at the criminal trial of Mr. Avery -- this is Defendant's Exhibit 1054. So remember, this is after Defendant Heier has been sitting in the prison listening to Antron Kent say you know, I want to get something from this. I want to get some reduction on this. So then Defendant Heier is asked at Mr. Avery's trial, did you tell him you'd get anything from this? No. Did he ever ask you for anything? No, sir. And why did he tell you he's doing this? He said he has to sleep with this, knowing what was told to him. He felt it

was the right thing to do. Well, if you believe Detective Armbruster, that's not true.

So that's how these false convictions occur and that, apparently is the modis operandi. No one felt this was a big deal. It was almost like are you kidding? Of course we don't record this. That's how these false convictions occurred.

Follow the evidence. The Defendants in this case have repeatedly falsified evidence. Heier -- I just went through some of the evidence that he falsified. Allowing -- failing to tell anyone that Kimbrough said it was a lie before he testified. Sitting there while Kimbrough -- while Kent tells lies. Telling lies himself at the criminal trial of Mr. Avery. Mr. Armbruster -- Detective Armbruster, I'm sorry, or Lieutenant, I believe. Helping to fabricate the Kimbrough statements. DeValkenaere, less involved. But he did have the false statement about sex. Detective Hein-Spano also less involved, but also involved in fabricating the inmate statements. But the primary person who's responsible, the primary person who's responsible for creating the most inculpatory evidence in this case, are Mr. Hernandez and Phillips.

So follow the evidence. The only reasonable explanation here is that that 3/24 statement didn't happen. And it certainly didn't happen in the way that Detective Hernandez represented it to happen. And you may remember the first time

around when he's up there, I said if there's any doubt, you have to record that. Detective DeValkenaere said if there's any doubt about what you heard? If there's any question about whether this was -- whether you got it right? You've got to record that. Because this is crucial. If you give information to a witness, you've got to record that. Because you may just be getting that information spit right back at you. But they didn't do that.

Detective Hernandez and Phillips created a report that claimed that Mr. Avery had unequivocally said I killed Mercedes. What other explanation is there for that? For the statement? I killed Mercedes. I got in a fight. She's dead. I moved her body. Not that she left the house and then ran into Walter Ellis somewhere on the street. No. She's in the house. She's killed. Her body was moved.

So we ask you to award appropriate damages for Mr. Avery. And I just want to make one comment. Six years in prison. Six years of strip searches. Six years of not having your freedom. Six years of being told what to do. Six years not being able to go outside into the free world. That's only worth $750,000? Why is that? Is that because Mr. Avery is considered somehow lesser entitled to Constitutional protections? Well, obviously he's not. Mr. Avery is entitled to all the Constitutional protections that we all have. And in this case, 750,000, as a suggested damage award fails to reflect

that he has those same rights as everyone else, and he should get a fully compensatory damages award. Thank you very much.

THE COURT: Now, ladies and gentlemen, I'm going to read the jury instructions to you. I have given you some of these instructions prior to the trial, so some of that might be repetitive. But you've seen and heard all the evidence, and now you've heard the arguments of the attorneys. And you have two duties as a jury. First, you decide the facts from the evidence in this case. And this is your job and your job alone. Your second duty is to apply the law as I give it to you now. You must follow these instructions. And you all indicated before the start of the trial that you would, even if you disagree with them.

Now, each of the instructions is important. Perform these duties fairly and impartially. Do not allow sympathy, or fear, or prejudice, or public opinion to influence you. You should not be influenced by any person's race, sex, color, religion, national ancestry.

Nothing I say now, or I said during the course of the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. You are the sole deciders of the facts.

The evidence consists of the testimony of the witnesses, the Exhibits admitted into evidence, and stipulations. And a stipulation is an -- as I said earlier --

is an agreement between both sides that certain facts are true, and that a person would give -- would have given certain testimony that's contained in the stipulation.

You must decide whether the testimony of each of the witnesses is truthful and accurate in part, in whole, or not at all. As well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things, the witness's intelligence, the ability and opportunity the witness had to see, hear, or know the things that the witness testified about. The witness's memory. Any interest, bias prejudice the witness may have had or has. The manner of the witness while testifying. And the reasonableness of the witness's testimony in light of all the evidence in the case.

You should use common sense in weighing the evidence. And consider the evidence in light of your own observations and experiences in life. In our lives we often look at one fact and conclude from it that another fact exists. In the law we call this an inference. And you are allowed, as a jury, to draw and make reasonable inferences. Any reasonable inferences you make must be -- well, any inference you make -- inferences you make must be reasonable, and must be based again on the evidence in the case.

You have heard the phrases direct evidence and

circumstantial evidence. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact. As an example, direct evidence that it is raining is testimony from a witness who says I was outside a minute ago and I saw it raining. Circumstantial evidence that it is raining is the observation of someone entering the room carrying a wet umbrella.

Now, you are to consider both direct and circumstantial evidence. The law does not consider one better than the other. It's up to you to decide how much weight to give any evidence, whether it is direct evidence or circumstantial evidence.

Certain things are not evidence, and I've talked about this a bit before. I will list them again. First, testimony and Exhibits that I struck from the record. And I don't recall doing that in any significant way during the course of the trial, but any that I may have, or that I told you -- any evidence that I told you to disregard, that must not be considered.

Anything that you may have seen or heard outside the courtroom, which I stressed earlier, is not evidence and must be entirely disregarded. And that includes any press, radio, internet, television reports that you may have seen or heard. Such reports are not evidence, and your verdict must not be influenced in any way by any such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object to what they think and believe are -- when a question is improper, and you should not be influenced by any objection by the attorneys or by my ruling on it.

Fourth, the lawyers' statements and anything that the lawyers say in a Court of law is not evidence, as I indicated at the start of the trial. The purpose of these statements, both opening statements and final or closing arguments, is to discuss the issues and the evidence. If the evidence as you remember differs from what the lawyers said, it is your memory that counts.

You're advised that it's proper for an attorney to interview any witness in preparation for trial.

In addition, you may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have heard a witness, Antron Kent, claim his Fifth Amendment privilege against self incrimination in response to questions here at trial. You may, but are not required to draw an inference from Mr. Kent's invocation of his Fifth Amendment privilege that truthful answers to the questions he was asked would have incriminated him.

Now, the Plaintiff in this case is William Avery. And

I will refer to him, as I continue these instructions, as the Plaintiff. Or as Mr. Avery. The Defendants in this case are the City of Milwaukee, Gilbert Hernandez, Daniel Phillips, Katherine Hein-slash-Spano, Timothy Heier, Kevin Armbruster, and James DeValkenaere, who are current or retired Milwaukee Police Officers. And I will refer to them as Defendants.

The Plaintiff claims that the Defendants violated his civil rights, failed to intervene to prevent the violation of his civil rights, and conspired to violate his civil rights. As to the City of Milwaukee, the Plaintiff contends that a policy or widespread practice of the City caused the violation of his civil rights.

The Defendants deny each of the Plaintiff's claims. And you must give separate consideration to each claim and to each Defendant.

Now, when I say a particular party must prove something by, quote, a preponderance of the evidence, or when I use the expression if you find, quote, close quote, or quote, if you decide, close quote, this is what I mean. When you've considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

The Plaintiff's first claim is that Defendants Hernandez, Phillips, Hein/Spano, Heier, Armbruster, and DeValkenaere violated his Constitutional right do due process of law by fabricating evidence. To succeed on this claim as to a

particular Defendant you are considering, the Plaintiff must prove the three following things by a preponderance of the evidence.

First, the Defendant knowingly fabricated or participated in a fabrication of material false evidence used to convict the Plaintiff at trial.

Two, both the Defendant and the witness knew the evidence against the Plaintiff was false.

And three, the Plaintiff was damaged as a result of the fabrication.

The term fabrication will now be defined. And it is -- fabricated evidence is evidence that was created or made up.

I will now define the determine material. With regard to Plaintiff's criminal trial, fabricated evidence is considered material if it would have had a reasonable likelihood of affecting the outcome of the case.

Now, if you find that the Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for the Plaintiff and go on to consider the question of damages. If, on the other hand, you find that the Plaintiff has failed to prove any of these things by a preponderance of the evidence, then you should find for the Defendants, and you will not consider the question of damages.

Now, Plaintiff must prove by a preponderance of the evidence that Gilbert Hernandez, Daniel Phillips, Katherine

Hein/Spano, Timothy Heier, Kevin Armbruster, or James DeValkenaere were personally involved in the conduct that the Plaintiff complains about. You may not hold any one of these individuals liable for what other employees did or did not do.

However, the Plaintiff's second claim is that Defendants Hernandez, Phillips, Hein/Spano, Heier, Armbruster, and DeValkenaere failed to intervene to stop the violation of Plaintiff's due process rights. Specifically, the Plaintiff alleges that each of these Defendants knew that one or more of the other Defendants violated his due process rights, but failed to stop the violation, and should therefore be held liable.

To succeed on this claim, the Plaintiff must prove each of the following things by a preponderance of the evidence as to the particular Defendant you are considering:

First, that Plaintiff's due process rights were violated by one or more of the Defendants. That the relevant Defendant in the claim knew that one or more of the Defendants violated the Plaintiff's due process rights. Three, that the relevant Defendant had a realistic opportunity to stop the violation of the Plaintiff's due process rights. Four, that the relevant Defendant did not take reasonable steps to stop the violation of the Plaintiff's due process rights, despite his opportunity or her opportunity to do so. And five, as a result, the Plaintiff's due process rights were violated as defined in the first claim.

The Plaintiff's third claim is that Defendants Hernandez, Phillips, Hein/Spano, Heier, Armbruster, and DeValkenaere conspired to deprive him of his right to due process of law by fabricating false evidence. A conspiracy is an agreement to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means.

To succeed on this claim, the Plaintiff must prove each of the following things by a preponderance of the evidence as to the particular Defendant you are considering.

First, the Plaintiff must prove there was an agreement between two or more persons to fabricate false evidence. The Plaintiff must prove that the participants shared this common purpose. He does not have to prove there was a formal agreement or plan in which all involved met together and worked out the details. He also does not have to prove that each participant knew all the details of the conspiratorial plan, or the identity of all the participants.

Two, the Defendant knowingly became a member of the conspiracy with the intention to carry out the conspiracy.

Three, one or more of the conspirators committed an act in an effort to carry out the conspiracy.

And four, as a result, the Plaintiff's due process rights were violated as defined in the first claim.

Now, you must decide whether any of the Defendants' actions caused the injury. This question does not ask about the

cause, but rather a cause, because an injury may have more than one cause. Someone's act caused the injury if it was a substantial factor in producing the injury. An injury may be caused by one person's act, or by the combined acts of two or more people.

There's a policy claim against the City of Milwaukee. That's the fourth claim. And that claim is that the City of Milwaukee had a policy or widespread practice that caused a violation of his right to due process of law.

To succeed on this claim, the Plaintiff must prove each of the following things by a preponderance of the evidence. One, material evidence was fabricated. These terms have the same definition that I provided in connection with the Plaintiff's first claim.

Two, at the time of the fabrication it was the policy of the City of Milwaukee to not adequately investigate homicides. As used in this case, the term policy means a widespread practice that is so permanent and well-settled that it constitutes a custom or practice.

Three, the policy as I described it in paragraph 2 caused the fabrication of material evidence.

Now, the City of Milwaukee is not responsible simply because it employed any such Defendant. The City of Milwaukee is liable to Plaintiff if the Plaintiff proves by a preponderance of the evidence that the Defendant or Defendants'

actions in fabricating evidence denied Plaintiff the right to a fair trial as a result of its official policy.

When I use the term official policy, I mean a rule or regulation passed by the City of Milwaukee's legislative body, or decision or policy statement made by the Chief of the Milwaukee Police Department, who is the policy making official of the City of Milwaukee; or a custom of inadequately investigating homicides at the time in question, which led to the fabrication of evidence that was consistent and widespread so that it was the City of Milwaukee's standard operating procedure. A persistent and widespread pattern may be a custom even if the City of Milwaukee has not formally approved it, so long as the Plaintiff proves that a policy making official knew of the pattern and allowed it to continue.

Now, if you find in favor of the Plaintiff on any of his claims, then you must determine what amount of damages, if any, the Plaintiff is entitled to recover. If you find in favor of the Defendants on all of the Plaintiff's claims, then you will not consider the question of damages.

Damages are -- he has -- damages as compensatory damages are defined. If you find in favor of the Plaintiff on one or more of his claims, then you must determine the amount of money that will fairly compensate him or for any injury that you find he sustained as a direct result of the Defendant's wrongful conduct. This is called compensatory damages. The Plaintiff

must prove his damages by a preponderance of the evidence. Your award must be based on evidence, and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money. They include the mental and emotional aspects of injury, even if they are not easy to measure.

You should consider only the following types of compensatory damages: Any physical, mental, and emotional pain and suffering that the Plaintiff experienced to the present, and any loss of normal life that the Plaintiff experienced to the present.

No evidence of the dollar value of any physical, mental, or emotional pain and suffering, or of the value of loss of a normal life has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of these facts. You are to determine an amount that will fairly compensate the Plaintiff for any injury he has sustained.

Now, if you find for the Plaintiff, you may, but are not required to, assess punitive damages against the Defendants. The purpose of punitive damages are to punish a Defendant for his or her conduct, and to serve as an example or warning to the Defendant and others not to engage in similar conduct in the future.

The Plaintiffs must prove by a preponderance of the

evidence that punitive damages should be assessed against the Defendants. You may assess punitive damages only if you find that his or her conduct was malicious or in reckless disregard for Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring the Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of these damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either or any party.

In determining the amount of any punitive damages, you should consider the following factors: The reprehensibility of the Defendants' conduct; the impact of the Defendants' conduct on the Plaintiff; the relationship between the Plaintiff and the Defendant; the likelihood that the Defendant would repeat the conduct if an award of punitive damages is not made; and the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Now, upon retiring to the jury room, ladies and gentlemen, select one of your number as the foreperson. And the foreperson will preside over your deliberations and will be your

representative here in court.

Forms of verdict have been prepared for you, and I will read those. Question 1: Did any of the Defendants fabricate evidence that was the cause of the homicide conviction of William Avery? And then all of the Defendants are listed. I'm not going to name them all again. And then there's a yes or no beside or alongside your answer.

Now, if you answered "no" to all parts of Question 1, then you need not answer any of the remaining questions. However, if you answered "yes" to any part of Question 1, then answer Question 2.

Question 2: Did any of the Defendants fail to intervene to prevent the use of fabricated evidence? And then again there's a listing of all the Defendants. And it goes on after that, if you answered "yes" to any of the Defendants in Questions 1 or 2, then answer Question 3.

Question 3: Did any of those Defendants conspire to use fabricated evidence that was a cause of the homicide conviction of William Avery? And then there's a listing of all the Defendants, again. If you answered "yes" to any part of Questions 1, 2, or 3, then answer Question Number 4.

Question Number 4. Did the City of Milwaukee have a policy, practice, or custom of inadequately investigating homicides at the time in question which led to the fabrication of evidence resulting in the homicide conviction of William

Avery? Answer: "Yes" or "no".

If you've answered "yes" to any of the previous questions, then answer Question Number 5.

Question Number 5: We award the Plaintiff compensatory damages in the amount of -- and then there's a blank spot for that award.

If you answered "no" to all parts of Questions Numbers 1, 2, or 3, then you need not answer Question Number 6. However, if you answered "yes" to any part of Question Numbers 1, 2, or 3, then answer Question Number 6 as to any Defendant to which you answered "yes".

Question Number 6: What amount of money, if any, do you award the Plaintiff as punitive damages against the following Defendants. And then the Defendants are listed, and there's a blank line beside each of those listed Defendants.

It goes on to state dated at Milwaukee, Wisconsin, this blank day of June, 2015. There's a spot for the signature of the foreperson, and then next to that spot for the signature of the foreperson there's a place for that foreperson to print his or her name.

Now, take these forms to the jury room, and when you've decided -- when you've reached a unanimous verdict, agreement on the verdict, then the foreperson will sign and date it, and you will give it to the Bailiff. Advise the Bailiff, and when you advise the Bailiff, then he'll bring you back into

the courtroom when you've reached that verdict.

Now, I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the foreperson. Or if he or she is unwilling to do so, by some other juror that you select. The writing should be given to the Bailiff, who will give it, in turn, to me. And I will respond either in writing or by having you return to the courtroom so that we can respond -- so that I can respond orally.

Now, during your deliberations you must not communicate with or provide any information to anyone by any means about this case. And you should -- you may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry, or computer, the internet, any internet service -- you know, when I first started out doing this, I didn't have to give this instruction because there were only phones. And we didn't have phones in the jury room.

Any text or instant messaging service, any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, You Tube or Twitter to communicate to any person any information about this case, or to conduct any research about this case until I accept your verdict.

In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in

the jury room with your fellow jurors during deliberations. And I expect that you will inform me as soon as you become aware of another juror's violation of this requirement that I just read to you.

Now, the verdict must represent the considered judgment of all the jurors -- of each juror, excuse me. Your verdict, whether it's for or against the parties, also must be unanimous. As I indicated, you should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, listen to the opinions of your fellow jurors, discuss your differences with an open mind. Do not hesitate to change or re-examine your own views and your opinion if you come to believe it is wrong, but you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors, or solely for the purpose of returning a unanimous verdict.

The 9 of you should give fair and equal consideration to all the evidence, and deliberate with the goal of reaching agreement which is consistent with the individual judgment of each juror. You are the impartial judges of the facts.

Now, Madam Clerk, would you swear the Bailiff, please.

(Whereupon the Bailiff was duly sworn.)

THE COURT: All right. Ladies and gentlemen, you will be given a copy of these instructions that I gave you. But would you now follow the Bailiff.

(Whereupon the jury was excused at 3:05 p.m.)

THE COURT: Any objection to the instructions as read?

MR. ELSON: Not from the Plaintiff.

THE COURT: We'll abide the decision of the jury. Relative to Exhibits? The Court's policy is to let them see what they ask for. Any objection to that?

MR. STAINTHORP: No.

MR. SMOKOWICZ: There are a couple of Exhibits that are marked as not to go to the jury, and that would be consistent with our --

THE COURT: If they're marked not to go to the jury, then they won't go to the jury. And the Clerk will make sure that that is observed. All right. We'll abide the jury.

MR. STAINTHORP: Okay. Thank you, Judge.

MR. SMOKOWICZ: Thank you.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

I, HEIDI J. TRAPP, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing Transcript of Proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Hon. Rudolph T. Randa.

_____
Official Court Reporter
United States District Court

Dated at Milwaukee, Wisconsin,
this 30th day of November, 2015.